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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940 1941

No. 54 2

**MARTIN J. BERNARDS AND LENA BERNARDS,
PETITIONERS,**

vs.

**M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF PORT-
LAND, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED APRIL 12, 1940.

CERTIORARI GRANTED APRIL 29, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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PETITIONERS,

vs.

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UNITED STATES NATIONAL BANK OF PORT-
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INDEX.

	Original	Print
Record from D. C. U. S., District of Oregon.....	1	1
Debtors' petition	1	1
Restraining order	4	3
Proofs of service of restraining order.....	7	4
Order of reference to conciliation commissioner.....	11	6
Order discharging conciliation commissioner.....	12	6
Petition to re-refer case to conciliation commissioner...	13	7
Order re-referring case to conciliation commissioner....	15	8
Report of conciliation commissioner.....	16	8
Amended petition praying to be adjudged bankrupt.....	18	9
Schedule "A"—Statement of unsecured debts.....	21	11
Adjudication of bankruptcy, Martin J. Bernards.....	25	13
Adjudication of bankruptcy, Lena Bernards.....	26	14
Order of reference to referee in bankruptcy	27	14
Minute entry of proceedings before referee, May 21, 1935	28	15

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	Original	Print
Record from D. C. U. S., District of Oregon—Continued		
Petition of Martin J. Bernards, for order directing referee to return to the court all records.....	29	16
Order directing referee in bankruptcy to return record and for reference to conciliation commissioner.....	32	17
Order of reference to conciliation commissioner.....	34	19
Petition to conciliation commissioner, for order granting bankrupts immediate possession of property.....	35	19
Reply of bankrupts	39	22
Notice of appeal from orders of conciliation commissioner	43	23
Order confirming orders of conciliation commissioner...	44	24
Petition of bankrupts to conciliation commissioner, for return of certain property, to amend schedules, etc....	45	25
Exhibit "A"—Affidavit of Francis Duyek	50	27
Exhibit "B"—Affidavit of Charles Kyler.....	51	28
Exhibit "C"—Affidavit of Winifred Dallmann.....	52	28
Order of conciliation commissioner sustaining motion to dismiss petition	55	30
Petition to court for order restraining trustee from making sale	57	31
Order denying petition for restraining order.....	59	32
Petition for review of order of conciliation commissioner	60	33
Motion of bankrupts to set aside all orders of court....	62	34
Reply of bankrupts to all answers.....	63	35
Petition of bankrupts for appointment of appraisers..	64	36
Order and decree by the judge.....	67	37
Order affirming order of conciliation commissioner....	70	39
Objections to findings of fact and conclusions of law....	72	40
Appellants' praecipe for transcript of record.....	73	40
Stipulation as to record.....	76	43
Clerk's certificate	77	(omitted in printing) ..
Schedule "B"—Schedule of personal property.....	78	43
Order of court dissolving restraining order.....	84	48
Conciliation commissioner's order and decree.....	86	49
Conciliation commissioner's order appointing trustee...	92	54
Conciliation commissioner's order approving trustee's bond	93	54
Conciliation commissioner's certificate on review.....	94	55
Appraisement	99	58
Order of exemption.....	104	62
Supplemental appraisement	106	63
Findings of fact.....	108	64
District Judge's order nunc pro tunc dissolving restraining order of August 10, 1934.....	124	74
Appellees' counter praecipe	126	76
Clerk's certificate	129	(omitted in printing) ..
Petition of bankrupts excepting to decisions of commissioner, etc.	130	77
Answer of Catherine H. Collins	146	87
Answer of Joseph M. Loomis.....	153	91

INDEX

iii

	Original	Print
Record from D. C. U. S., District of Oregon—Continued		
Answer of M. R. Johnson and The United States National Bank of Portland, Oregon.....	168	100
Exhibit "B"—Order of confirmation, July 20, 1935, Circuit Court of Washington County.....	179	108
Exhibit "A"—Decree of Circuit Court of Washington County, July 11, 1934.....	185	112
Motion of M. R. Johnson and The United States National Bank of Portland, Oregon.....	193	116
Praeipe for supplemental transcript of record.....	195	117
Clerk's certificate (omitted in printing) ..	196	
Proceedings in U. S. C. C. A., Ninth Circuit.....	197	118
Petition for leave to appeal under Bankruptcy Act, Section 24(b)	197	118
Assignments of error	204	122
Petition and order extending time to file amended petition..	208	125
Supplement to petition for leave to appeal.....	209	126
Schedule "B"—Statement of personal property.....	215	129
Order submitting petition for allowance of appeal.....	218	131
Order allowing appeal	219	131
Citation and service (omitted in printing) ..	220	
Order granting application for leave to prosecute appeal in forma pauperis	222	132
Motion for writ of certiorari to correct diminution of record	223	132
Praeipe for additional parts of record.....	226	134
Decree of conciliation commissisoner, August 8, 1936....	227	135
Amendment of December 2, 1914 to Rule 1 of Bankruptcy Rules of D. C. U. S., District of Oregon.....	242-a	146
Objections to motion for writ of certiorari.....	244	147
Order of submission	248	149
Order for supplemental transcript	249	150
Order directing filing of opinion and decree.....	251	151
Opinion, Mathews, J.	252	151
Decree	259	158
Order staying issuance of mandate.....	260	158
Clerk's certificate (omitted in printing) ..	261	
Motion to recall and withhold mandate.....	265	159
Order denying motion to recall mandate.....	267	160
Motion and petition for recall and correction of mandate, etc.	268	160
Motion to dismiss motion and petition for recall and correction of mandate, etc.	270	161
Order submitting motion for recall of mandate.....	272	162
Order denying petition for recall and correction of mandate, etc.	273	162
Clerk's certificate (omitted in printing) ..	274	
Order allowing certiorari	275	163

[fol. 1]

**IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON**

In Bankruptcy No. B-19268

In the Matter of MARTIN J. BERNARDS AND LENA BERNARDS,
Debtors

PETITION—Filed August 10, 1934

To the Honorable the Judges of the United States District
Court for the District of Oregon:

The petition of Martin J. Bernards and Lena Bernards
respectfully represents and shows:

1. That during all the times in this petition mentioned the
petitioners were and now are husband and wife.

2. That for more than six months last past the petitioners
were and are now residents and inhabitants of Orenco, in
the County of Washington, State of Oregon, within said
District.

3. That they are the owners and in the actual possession
of the farm lands particularly described in Schedules B and
D attached to this petition, in the interests therein set forth,
and that they are actively engaged in the cultivation and
operation of said farm lands, and that their entire income
is derived from farming operations; that said farming
operations occur in the County of Washington, within said
judicial District; that they are unable to meet their debts
as they mature, and that they desire to effect a composition
and extension of time to pay their debts under Section 75
of the Bankruptcy Act, and the acts amendatory thereof
and supplemental thereto.

[fol. 2] 4. That this Court has appointed A. W. Hoffman
Conciliation Commissioner, within said District, for the
County of Washington, State of Oregon, and said Commis-
sioner has qualified.

5. That your petitioners have endeavored to, but have
failed to obtain the acceptance of a majority in number and

amount of all creditors whose claims are affected by a composition or extension.

6. That the schedule hereto annexed marked A, and verified by the oath of your petitioner Martin J. Bernards, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

7. That the schedule hereto annexed marked B, and verified by the oath of your petitioner Martin J. Bernards, contains an accurate inventory of all of his property, both real and personal, and such further statements concerning said property as are required by the provisions of said Act.

8. That the schedule hereto annexed marked C, and verified by the oath of your petitioner Lena Bernards, contains a full and true statement of all of her debts, and (so far as it is possible to ascertain) the names and places of residence of her creditors: and such further statements concerning said debts as are required by the provisions of said Act.

[fol. 3] 9. That the schedule hereto annexed marked D, and verified by the oath of your petitioner Lena Bernards, contains an accurate inventory of her property, both real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore, your petitioners pray that this petition may be approved by the Court, and that proceedings be had in accordance with said Section and the acts amendatory thereof and supplemental thereto, and that your petitioners be granted such other and further relief as to this Court may seem just and proper.

(Signed) Martin J. Bernards, Lena Bernards, Petitioners, J. P. Kavanaugh, R. N. Kavanaugh, Attorneys for Petitioners.

*Duly sworn to by Martin J. Bernards and Lena Bernards.
Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

RESTRAINING ORDER—Filed August 10, 1934

It appearing to the court from the petition of the above-named Martin J. Bernards and Lena Bernards that they are the owners and in possession of the following described real property, situated in the County of Washington, State of Oregon:

(Description omitted.)

[fol. 5] and that the petitioner, Martin J. Bernards, is the owner of the following described personal property, to wit: Water Works Extension Bonds of the City of Orenco of the Tualatin Valley, a municipal corporation of the State of Oregon, as follows: Nos. 6, 7, 8, 9, 10, 11 and 41, for \$1000 each, but \$400 has been paid on account of Bond No. 6, leaving a balance in the principal of said bond in the sum of \$600, together with the interest coupons attached to each bond; that said personal property is now in the possession of plaintiff, The United States National Bank of Portland, (Oregon), and is pledged to secure the payment of a debt of plaintiff, M. R. Johnson to said plaintiff, The United States National Bank of Portland, (Oregon).

And it appearing that in an action in the Circuit Court of the State of Oregon, for the County of Washington, wherein M. R. Johnson and The United States National Bank of Portland (Oregon) are plaintiffs, and Martin J. Bernards and Lena Bernards (the petitioners) and others, are defendants, the plaintiffs obtained a decree of foreclosure of mortgages on said real property, and of a pledge of said personal property, and that proceedings are now pending in said cause for the sale of all of said property upon execution, and that unless restrained by order of this court, the sheriff of the County of Washington, State of Oregon, will sell all of said property on Saturday, the 11th day of August, A. D. 1934, and let the purchaser at said sale [fol. 6] into possession of said property, and that the petitioners will thereby be deprived of the possession of said real property.

And it appearing that petitioners are entitled to an order restraining further proceedings for the sale of said property, as prayed for in their petition.

Be It Therefore Ordered that J. W. Connell, sheriff of the County of Washington, State of Oregon, his deputies and assistants, and plaintiffs M. R. Johnson and The United States National Bank of Portland (Oregon), and their agents and attorneys, be, and each of them are hereby enjoined and restrained from proceeding with the sale of any of said property upon execution, or in anywise interfering with the possession of said property by the petitioners until the further order of this court.

Dated this 10th day of August, A. D. 1934.

John H. McNary, Judge.

[File endorsement omitted.]

[fol. 7]

Form No. 282

RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA,
District of Oregon, ss:

I hereby certify and return that I served the annexed Restraining Order on the therein-named John W. Connell, at his residence, at 6:00 P. M. by handing to and leaving a true and correct copy thereof with the said John W. Connell personally at Hillsboro in said District on the 10th day of August, A. D., 1934.

J. T. Summerville, U. S. Marshal. By G. M. Watson,
Deputy.

M. Fees \$8.00

Exp. \$1.25

Total \$9.25

[fol. 8]

Form No. 282

RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA,
District of Oregon, ss:

I hereby certify and return that I served the annexed Restraining Order on the therein-named E. B. Tongue,

at the intersection of Main Street and the P. R. & N. Railroad tracks, at 6:15 P. M. by handing to and leaving a true and correct copy thereof with the said E. B. Tongue personally at Hillsboro in said District on the 10th day of August, A. D., 1934.

J. T. Summerville, U. S. Marshal. By G. M. Watson,
Deputy.

M.

[fol. 9]

Form No. 282

RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA,
District of Oregon, ss:

I hereby certify and return that I served the annexed Restraining Order on the therein-named M. R. Johnson, at his residence, corner of 4th Ave. & 1st St., at 6:55 P. M. by handing to and leaving a true and correct copy thereof with the said M. R. Johnson personally at Forest Grove in said District on the 10th day of August, A. D., 1934.

J. T. Summerville, U. S. Marshal. By G. M. Watson,
Deputy.

[fol. 10]

Form No. 282

RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA,
District of Oregon, ss:

I hereby certify and return that I served the annexed Restraining Order on the therein-named United States National Bank, of Portland, Oregon, 6th & Stark St., at 1:55 P. M. by handing to and leaving a true and correct copy thereof with Walter M. Cook, Cashier of said bank personally at Portland in said District on the 13th day of August, A. D., 1934.

J. T. Summerville, U. S. Marshal. By G. M. Watson,
Deputy.

Return on service of Restraining Order—Filed August 13, 1934. G. H. Marsh, Clerk.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF REFERENCE—Filed Aug. 10, 1934

Whereas, the petition of Martin J. Bernards and Lena Bernards filed in this Court on the 10th day of August, A. D. 1934, praying that he be afforded an opportunity to effect a composition or an extension of time to pay his debts under Section 75 of the Bankruptcy Act, having been duly approved by order of this Court on the 10th day of August, A. D. 1934, it is thereupon ordered that said matter be referred to A. W. Hoffman, one of the Conciliation Commissioners of this Court, to take such further proceedings therein as are required by said section; and that the said Martin J. Bernards and Lena Bernards shall attend before said conciliation commissioner on the 16th day of August, 1934, at Hillsboro, in said district and thenceforth shall submit to such orders as may be made by said conciliation commissioner or by this Court relating to the proceedings under said section.

Witness, the Honorable John H. McNary, Judge of the said Court, and the seal thereof, at Portland, in said District, on the 10th day of August, A. D. 1934. By G. H. Marsh, Clerk. L. S. Rogers, Deputy. (Seal.)

[File endorsement omitted.]

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DISCHARGING CONCILIATION COMMISSIONER—Filed
October 17, 1934

It appearing to the Court that the above named debtors filed a petition in this Court on August 10, 1934 and that said petition was referred to A. W. Hoffman, a duly appointed and qualified conciliation commissioner of this Court for the county in which the said debtors reside; that said conciliation commissioner has filed a report herein, reporting to the Court that the debtors and their

creditors cannot agree on terms of composition or extension:

And it further appearing that said conciliation commissioner has certified to the Court that his duties as conciliation commissioner have been completed:

It is therefore Ordered that the said A. W. Hoffman, conciliation commissioner in said cause be and he is hereby discharged from further proceeding in this case.

John H. McNary, Judge.

[File endorsement omitted.]

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION TO RE-REFER CASE—Filed October 27, 1934

To the Honorable, the Judges of the United States District Court for the District of Oregon:

At this time come Martin J. Bernards and Lena Bernards and respectfully represent and show:

1. That their petition in the above entitled cause was heretofore referred to A. W. Hoffman, Conciliation Commissioner for the County of Washington, in the District of Oregon, that said Conciliation Commissioner called a first meeting of creditors: that your petitioners attended said meeting and petitioner, Martin J. Bernards was examined by the creditors.

2. That at said meeting a proposal was submitted by your petitioners for the compromise and extension of their debts: that a later meeting of creditors was called by said Conciliation Commissioner and said proposal was not accepted or approved by said creditors.

3. That your petitioners desire to submit another proposal to their creditors for the compromise and extension of their debts and that for this purpose it is necessary [fol. 14] that their petition in the proceedings herein be re-referred to said Conciliation Commissioner.

Wherefore, your petitioners pray for an order of this Court again referring their petition in the proceedings herein to A. W. Hoffman, Conciliation Commissioner for

the county of Washington, in the District of Oregon, for the purpose of enabling your petitioners to submit another proposal to said creditors for the compromise and extension of their debts.

Martin J. Bernards, Lena Bernards. J. P. Kavanaugh, R. N. Kavanaugh, Attorneys for Petitioners.

*Duly sworn to by Martin J. Bernards and Lena Bernards.
Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER RE-REFERRING CASE—Filed October 29, 1934

At this time come Martin J. Bernards and Lena Bernards, the above-named debtors and move the Court for an order referring the above-entitled cause to A. W. Hoffman, conciliation commissioner for the county of Washington, in the District of Oregon, in order to enable the debtors to submit another proposal of compromise and extension to their creditors:

It Is Therefore Ordered that said cause be and it is hereby re-referred to A. W. Hoffman, conciliation commissioner for the county of Washington, in the District of Oregon, to enable the above-named debtors to submit another proposal of compromise and extension to their creditors.

Dated this 29th day of October, 1934.

John H. McNary, Judge.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPORT OF CONCILIATION COMMISSIONER—Filed December 17, 1934

To Honorable John H. McNary and James Alger Fee, Judges of the District Court of the United States for the District of Oregon:

In pursuance to an order issued out of the District Court of the United States for the District of Oregon on the 29th

day of October, 1934, I held the second meeting of creditors after giving due notice as required by law at Hillsboro, in the county Courtroom at the county courthouse, on the 4th day of December, A. D. 1934, at 10:00 o'clock in the forenoon. The debtors at that time and place filed their written proposal of composition and extension of their debts. After the debtors had been examined by the attorney for M. R. Johnson, the majority creditor, Mr. Johnson, made a verbal rejection of the proposal. At that time I set the 14th day of December, A. D. 1934, as the date for filing application for confirmation of the extension proposal.

[fol. 17] In accordance with the above and the records hereto attached I hereby submit to your Honorable Court that the duties of the conciliation commissioner in the matter of Martin J. Bernards and Lena Bernards, debtors, have been completed.

Respectfully submitted this 15th day of December, A. D. 1934.

A. W. Hoffman, Conciliation Commissioner for the county of Washington, State of Oregon.

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED PETITION—Filed December 19, 1934

To the Honorable the Judges of the United States District Court for the District of Oregon:

At this time come Martin J. Bernards and Lena Bernards and file their amended petition and respectfully represent and show:

1. That on or about the 10th day of August, 1934, the petitioners, as debtors, filed their petition for relief as debtors under Section 75 of the Bankruptcy Act and the acts amendatory thereof and supplemental thereto, and this petition is amendatory of said original petition.

2. That during all the times in this petition mentioned the petitioners were and now are husband and wife.

3. That for more than six months last past the petitioners were and now are residents and inhabitants of Orenco, in the County of Washington, State of Oregon, within said district.

4. That they are the owners and in actual possession of the farm lands described in Schedules "B" and "D" attached to this petition, in the interests therein set forth, and that they are actively engaged in the cultivation of said farm lands as a farm, and that their entire income is derived [fol. 19] from such farming operations; that said farming operations occur in the County of Washington, within said judicial district; that they are unable to meet their debts as they mature; and that they desire to obtain the benefits of the Acts of Congress relating to bankruptcy and particularly Section 75 thereof, as amended by an act entitled "An Act to Amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto"; approved June 28, 1934.

5. That your petitioners have endeavored to obtain a composition and extension of their debts, but have failed to obtain acceptance of a majority in number and amount of all creditors whose claims are affected by composition or extension proposals.

6. That the schedule hereto annexed, marked "A" and verified by the oath of your petitioner, Martin J. Bernards, contains a true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Acts of Congress.

7. That the schedule hereto annexed, marked "B" and verified by the oath of your petitioner, Martin J. Bernards, contains an accurate inventory of all of his property, both real and personal, and such further statements concerning said property as are required by the provisions of said Acts of Congress.

[fol. 20] 8. That the schedule hereto annexed, marked "C" and verified by the oath of your petitioner, Lena Bernards, contains a full and true statement of all of her debts, and (so far as it is possible to ascertain) the names and places

of residence of her creditors; and such further statements concerning said debts as are required by the provisions of said Acts of Congress.

9. That the schedule hereto annexed, marked "D" and verified by the oath of your petitioner, Lena Bernards, contains an accurate inventory of her property, both real and personal, and such further statements concerning said property as are required by the provisions of said Acts of Congress.

Wherefore, your petitioners pray that they, and each of them be adjudged by this court to be bankrupts within the purview of said Acts of Congress.

(Signed) Martin J. Bernards, (Signed) Lena Bernards, Petitioners. J. P. Kavanaugh, R. N. Kavanaugh, Attorneys for Petitioners.

*Duly sworn to by Martin J. Bernards and Lena Bernards.
Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 21]

[Title omitted]

SCHEDULE "A"

Unsecured Debts

1. Peter Duyck, Forest Grove, Oregon. loan, \$70.00.
2. Marcella Pool, Hillsboro, Oregon. Services, \$40.00.
3. Charles Kyler, Orenco, Oregon. Laborer, \$100.00.
Paid \$40.00 since filing original schedule; balance due \$60.00.
4. Gordon Vikan, Portland, Oregon Laborer, \$22.00.
5. Lucy Duyck, Forest Grove, Oregon. Promissory note, \$4,500.00 and interest.
6. Pleasant Smith, Yamhill, Oregon. Balance due on purchase of ewes and lambs, \$82.50. Paid since filing of original schedules.
7. Paul Patterson, Hillsboro, Oregon. Attorneys's fees, \$67.50.
8. Pool & Gardner, Hillsboro, Oregon. Lumber, \$18.50.
9. Delta Drugstore, Delta, Oregon. Account, \$6.21.
10. Pickens Blacksmith Shop, Hillsboro, Oregon. Account, \$52.00.

11. Hillsboro Seed Co., Hillsboro, Oregon. Account \$43.92.

12. Imperial Seed Co., Hillsboro. Account, \$22.30.

13. Ireland Hardware Co., Hillsboro, \$38.60.

[fol. 22] 14. Christensen Machine Shop, Hillsboro, Account \$80.00.

15. Alaska Junk Co., Portland, Oregon. Account, \$15.00.

16. J. E. Haseltine & Co., Portland. Account, \$16.28.

17. J. E. Berkheimer & Co., Portland, Roofing, \$228.50.

18. Shell Oil Co., Portland, Oregon. Gasoline, \$99.92.

19. Dr. Nichol, Hillsboro. Veterinary services, \$7.50.

20. Dr. Huggins, Hillsboro. Medical services, \$25.00.

21. Dr. Ralph Fenton, Portland. Medical services, \$150.00.

22. Dr. Raymond Watkins, Portland. Medical services, \$100.00.

23. Winifred Waible, Hillsboro. Domestic Service, \$75.00.

24. Emanuel Hospital, Portland. Hospital service, \$25.00.

25. St. Vincent's Hospital, Portland. Hospital Service, \$40.00.

26. Portland Eye, Ear, Nose & Throat Hospital, Portland. Hospital service, \$30.00.

27. Dr. Fitzgibbon, John H., Portland. Medical services, \$43.00.

28. Herman Smith, Hillsboro. Baling straw, \$155.00.

29. Marty Bros., Beaverton. Hay, \$150.00.

30. Industrial accident Commission, Salem. Insurance, \$98.00.

31. Norman Arms, Forest Grove. Plumbing \$50.00.

32. Columbia Elevator Co., Portland. Pump work, \$17.00.

33. John Deere Plow Co., Portland. Spreader, \$140.00; erroneously listed in original schedule as \$40.00.

34. Ike Mullins, Portland. Tractor parts, \$80.00.

35. Dr. A. O. Pitman, Orenco. Medical services, \$63.00.

36. Portland Electric Power Co., Portland. Account, \$125.00.

[fol. 23] 37. City of Orenco. Judgment, \$30.00 and costs.

38. A. Lindgren, Forest Grove. Judgment, \$15.00.

39. A. R. Sawtelle and George T. Withington, Portland. Judgment, \$200.00 and costs.

40. J. P. Kavanaugh, Portland. Services rendered prior to June 28, 1934, \$2,000.00. Amount claimed by debtors to be too large.

41. J. P. Kavanaugh, Portland. Services rendered after June 28, 1934, in contemplation of bankruptcy, \$1,000.00; paid, \$175.00.

42. Taxes, State, County, and City, real estate and personal taxes, \$14,389.45, plus accruing taxes.

43. McKenzie Motor Company, Hillsboro. For repairs to Ford Pickup automobile, \$33.10.

44. Ted Crane, residence unknown. For labor, \$23.00.

45. White Company. Portland, Oregon. Truck parts, \$22.00.

46. Warrant of the City of Orenco, dated February 2, 1934, in favor of Clark, Skulason & Clark, on which there is an unpaid balance of \$1,478.60, together with interest thereon at the rate of 6% from April 13, 1931. This is an obligation of the city of Orenco, and petitioner Martin J. Bernards is the owner of about one-half of the taxable property of said city, and it is probable that when a levy is made for the payment of this warrant, about one-half of the balance due, or \$739.30 with interest, may be impressed upon real property owned by Martin J. Bernards situated in the City of Orenco.

47. Warrant of the City of Orenco, dated November 9, 1917, issued to F. I. Webber, in the sum of \$100.00, with interest at the rate of 6% per annum. No payments have been made on this warrant and it is doubtful validity.

[fol. 24] *Duly sworn to by Martin J. Bernards. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

ADJUDICATION OF BANKRUPTCY—Filed December 19, 1934

At Portland, in said District, on the 19th day of December, 1934, before the Honorable James Alger Fee, Judge of said Court in Bankruptcy, the petition of Martin J.

Bernards that he be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said Martin J. Bernards is hereby declared and adjudged a bankrupt accordingly.

Witness the Honorable James Alger Fee, Judge of the said Court, and the seal thereof, at Portland, in said District, on the 19th day of December, 1934.

G. H. Marsh, Clerk, by L. S. Rogers, Deputy Clerk.
(Seal.)

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

ADJUDICATION OF BANKRUPTCY—Filed December 19, 1934

At Portland, in said District on the 19th day of December, 1934, before the Honorable James Alger Fee, Judge of the said Court in Bankruptcy, the petition of Lena Bernards that she be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said Lena Bernards is hereby declared and adjudged a bankrupt accordingly.

Witness the Honorable James Alger Fee, Judge of the said Court, and the seal thereof, at Portland, in said District, on the 19th day of December, 1934.

G. H. Marsh, Clerk, by L. S. Rogers, Deputy Clerk.
(Seal.)

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF REFERENCE—Filed December 20, 1934

Whereas, Martin J. Bernards and Lena Bernards of Orengo in the County of Washington and District afore-

said, on the 19th day of December, 1934, were duly adjudged bankrupt upon a petition filed in this Court by them on the 19th day of December, 1934, according to the provisions of the Acts of Congress relating to bankruptcy:

It Is Therefore Ordered, That said matter be referred to Willard L. Marks, one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Martin J. Bernards and Lena Bernards shall attend before said Referee on the 5th day of January, 1935, at Albany in said district and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said — bankruptcy.

Witness the Honorable James Alger Fee, Judge of the Court, and the seal thereof, at Portland in said District, on the 20th day of December, 1934.

G. H. Marsh, Clerk. By L. S. Rogers, Deputy Clerk.

[File endorsement omitted.]

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY OF PROCEEDINGS BEFORE REFEREE—May 21,
1935

This being the day appointed by the Court for the continuation of the first meeting of creditors in the above bankruptcy by order made on February 14th, the day appointed for continuation of said first meeting I, the undersigned referee in Bankruptcy, in charge of this bankruptcy, do hereby certify;

(Inter Alia)

The Bankrupts were each present in person.

The Bankrupts, Martin J. Bernards, resumed the stand and his examination by creditors was concluded.

The creditors all waived examination of the bankrupt, Lena Bernards.

Claims were filed at or prior to said meeting as follows:

On motion made and carried J. W. Bailey, A. Griffith and H. A. Richardson were selected as appraisers to appraise the property of said estate.

No further business appearing the meeting adjourned.
Willard L. Marks, Referee in Bankruptcy.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION—Filed September 30, 1935

To the Honorable, the Judges of the District Court of the United States for the District of Oregon:

The Petition of Martin J. Bernards, one of the above-named bankrupts, respectfully represents and shows:

That the above-named bankrupts, who are husband and wife, filed their joint debtors' petition in this Court and cause to obtain a composition and extension in the payment of their debts; that said petition was referred to the Conciliation Commissioner of the County of Washington in the State and District of Oregon; that in proceedings taken before said Conciliation Commissioner petitioners were unable to obtain the consent of a majority in number and amount of his creditors, and accordingly said Conciliation Commissioner returned all of the proceedings and documents in said cause with his report that an agreement could not be effected for a composition or extension of the debts of said debtors on the proposals made, or otherwise; that in due season thereafter the above-named bankrupts filed herein their amended petition praying that they be adjudged bankrupts; that an adjudication of bankruptcy was duly made and entered, and all proceedings were re-[fol. 30]ferred to Willard L. Marks, Referee in Bankruptcy, and are now in his possession and under his control;

That by an Act of Congress entitled "An Act to Amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and acts amendatory thereof and supplemental

thereto" approved August 28, 1935, the authority of Conciliation Commissioners has been enlarged, and it is in said Act provided that he shall continue to act as Conciliation Commissioner and act as Referee in Bankruptcy when a farmer debtor amends his petition, asking to be adjudged a bankrupt under the provisions of subsection (s) of Section 75 of the Bankruptcy Act, and shall continue to so act until the case has been fully disposed of;

That the Referee in Bankruptcy to whom said proceedings were referred is of the opinion that the affairs of the bankrupt estates can be better administered by the Conciliation Commissioner of the County of Washington, in the State and District of Oregon, the county in which the property of the bankrupts is situated, but that an order of this court should be made and entered authorizing and directing that the proceedings and documents now in his possession be transferred to this court to be referred by the court to [fol. 31] the Conciliation Commissioner of said County of Washington;

Wherefore, your petitioner prays an order of this Honorable Court authorizing and directing said Referee to transfer to this court all documents and records in his possession in the matter of the estates of said bankrupts, together with a report of all proceedings therein to the time of said transfer.

Kavanaugh & Kavanaugh, Attorneys for Petitioner.

[File endorsement omitted.]

Duly sworn to by Martin J. Bernards. Jurat omitted in printing.

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DIRECTING REFEREE TO RETURN RECORD, ETC.—Filed
September 30, 1935

At this time comes Martin J. Bernards, one of the above-named bankrupts, and presents his duly verified petition, praying that Willard L. Marks, Referee in Bankruptcy, be authorized and directed to transfer to this court all proceed-

ings in the matter of the estates of the above-named bankrupts;

And it appearing to the court that the above-named Martin J. Bernards and Lena Bernards were heretofore adjudged bankrupts; that the proceedings in the above-entitled cause were referred to Willard L. Marks, Referee in Bankruptcy, and that they are now in his possession and under his control; that by an Act of Congress, commonly known as the Frazier-Lenke Act, passed by the last Congress and approved by the President August 28, 1935, the authority of the Conciliation Commissioner has been enlarged and it is in said Act of Congress provided that he shall continue to act as Conciliation Commissioner and act as Referee in Bankruptcy when a farmer debtor amends his petition, asking to be adjudged a bankrupt under the provisions of subsection (s) of Section 75 of the Bankruptcy Act, and shall continue to so act until the cause [fol. 33] has been finally disposed of;

And it further appearing that the Referee in Bankruptcy to which said proceedings have been referred is of the opinion that the affairs of the bankrupt estate can be better administered by the Conciliation Commissioner of the County of Washington in the District of Oregon, the county in which the property of the bankrupts is situated, but that an order of this court should be made and entered authorizing and directing that the proceedings and documents now in his possession be transferred to this court to be referred by the court to the Conciliation Commissioner of said County of Washington;

Be It Therefore Ordered that the order of reference heretofore made to Willard L. Marks, Referee in Bankruptcy, be and the same is hereby recalled, and that said Referee in Bankruptcy be and he is hereby authorized and directed to transmit to this court all records, documents, and proceedings in the matter of the estates of the above-named bankrupts now in his possession, and prepare and file with this court a report of all proceedings had before him up to the time of transfer; and

Be It Further Ordered that said proceedings be referred to H. A. Kuratli, Conciliation Commissioner of the county of Washington in the State and District of Oregon.

Dated this 30th day of September, 1935.

John H. McNary, Judge.

[File endorsement omitted.]

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF REFERENCE—Filed October 15, 1935

Whereas, Martin J. Bernards and Lena Bernards of Orenco, in the County of Washington and District aforesaid, on the 19th day of December, 1934, were duly adjudged a bankrupt upon a petition filed in this Court by them on the 19th day of December, 1934, according to the provisions of the Acts of Congress relating to bankruptcy; and pursuant to an order filed on September 30, 1935

It Is Ordered, That said matter be referred to Henry A. Kuratli, one of the Conciliation Commissioners of this Court, to take such further proceedings therein as are required by said Acts; and that the said Martin J. Bernards and Lena Bernards shall attend before said Conciliation Comm'r on the 21st day of October, 1935, at Hillsboro in said district, and thenceforth shall submit to such orders as may be made by said Conciliation Commissioner or by this Court relating to said --- bankruptcy.

Witness the Honorable John H. McNary, Judge of the said Court, and the sale thereof, at Portland in said District, on the 15th day of October, 1935.

G. H. Marsh, Clerk, By L. S. Rogers, Deputy Clerk.
(Seal.)

[File endorsement omitted.]

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION—Filed *July 15* ~~October 1~~, 1936

To the Honorable H. A. Kuratli, conciliator for Washington County:

Comes now the undersigned who are the bankrupts listed in the above-entitled proceedings and represent and show to the conciliator herein, as follows:

I

That on or about the 10th day of August, 1934, the above-named filed in the bankruptcy division of the above-entitled

Court their certain petition pursuant to Section 75 of the Bankruptcy Act for the purpose of offering to their creditors a composition of or extension of time for the payment of their debts and said petition was thereafter approved by the United States District Court for the District of Oregon, all as shown by the records on file in the office of the Clerk of the above-entitled Court.

II

That the creditors refused to accept the composition or extension as proposed and said petitioners filed a petition to be adjudged bankrupt under Section 75 of the Bankruptcy Law, which petition was granted prior to the 29th day of May, 1935.

[fol. 36]

III

That on or about the 29th day of May, 1935, an execution was issued in Washington County pursuant to a decree of foreclosure and the Sheriff of said county did on the 29th day of June, 1935, sell the real property described in the bankrupts' petition on file herein as Parcels Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 to M. R. Johnson and the United States National Bank of Portland for the sum of \$65,000.00, and the certificate of sale was issued to said M. R. Johnson and the United States National Bank and Catherine Collins.

IV

That the above-named petitioners filed objections to the confirmation of said sale and the Circuit Court of Washington County thereafter confirmed said sale on or about the 20th day of July, 1935.

V

That the above-named petitioners are farmers under and pursuant to the Frazer-Lenke Act as amended and approved by the President of the United States, August 29, 1935, and under said Act are entitled to the possession of said premises and the proceeds therefrom.

VI

That M. R. Johnson is endeavoring to exercise control of said premises hereinbefore described by parcels and did

on the 7th day of July, Notify and direct Martin J. Bernards, one of the undersigned to refrain from going upon any of the lands therein described.

That the provisions of the Frazer-Lemke Act passed and [fol. 37] approved by the President of the United States specifically entitle the bankrupts herein to have complete custody and actual possession of the premises and the crops thereon for the purpose of paying indebtedness and enabling said bankrupts to compromise and settle said indebtedness during the period of bankruptcy as provided in said acts.

That M. R. Johnson, above mentioned, has endeavored to gain exclusive possession of the real property and the crops therefrom and is endeavoring to harvest said crops and said crops are being harvested in such a manner that the benefit therefrom is lost all to the ultimate damage, loss and detriment to the undersigned as petitioners and also to the loss of the general creditors.

That under the provisions of said Act all parties except the bankrupts should be restrained from exercising any control over the real property and the bankrupt is entitled to immediate possession and complete control of the realty as well as management of the crops.

Wherefore, Petitioners pray the above-entitled conciliator for an order granting the undersigned immediate possession, control and management of the real properties described in said bankrupts petition and referred to as Parcels Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16; and for the further order restraining the Sheriff of Washington County and M. R. Johnson and the United States National Bank and Catherine Collins and either or any [fol. 38] of them from transferring without purchase of said property in accordance with the terms and provisions of the Frazer-Lemke Act as amended; and for the further order specifically extending the period of redemption as provided in said Frazer-Lemke Act.

Martin J. Bernards.

Duly sworn to by Martin J. Bernards. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY—Filed August 8, 1936

Come now the above-named bankrupts and for reply to the answer and petition of M. R. Johnson and the United States National Bank of Portland, a corporation, admit, deny and allege as follows, to wit:

1

Deny each and every allegation and matter set forth in said petition and answer and the whole thereof except any facts set forth therein which are specifically alleged in said bankrupts' petition or any facts set forth in said answer which are copies of Court records in the above-entitled Court or records of the Circuit Court of Washington County, Oregon, and

For Further and Separate Reply said petitioners allege

I

That the purchase price of the premises described in petitioners' schedule of bankruptcy on file herein was not en-[fol. 40] tirely supplied by the said M. R. Johnson.

II

The above bankrupts herein specifically and affirmatively allege that said bankrupts have an actual equity in said premises and farm in the amount of approximately \$80,000.00 in excess of the sum borrowed from said M. R. Johnson and said petitioners furthermore allege that the property referred to in paragraph IX of said answer and petition was agreed between the said M. R. Johnson and the petitioners to be of less value than the taxes and as a result thereof by said agreement the said petitioners and M. R. Johnson permitted the foreclosure of the delinquent tax certificates and said foreclosure in nowise and in no manner damaged or lessened the value of the farm property owned by the petitioners.

III

Said petitioners furthermore allege that throughout said proceedings and prior to the filing of said petitions for bankruptcy the petitioners have acted in good faith and except for the refusal of the said M. R. Johnson to accept

offers of compromise as shown by the records said petitioners could have obtained sufficient loan to pay the indebtedness of all creditors except the creditor, Mrs. Duyck, [fol. 41] which creditor at said time agreed to cancel said debt if Johnson would accept the offer of compromise and the said M. R. Johnson refused said offer of compromise for the purpose of endeavoring to recover said farm and defeat the petitioners rights therein.

Wherefore, Said petitioners having fully replied to the answer of M. R. Johnson and the United States National Bank of Portland, a corporation, pray that said answer and petition be dismissed and that said bankrupts have the relief prayed for in the petition on file herein and in addition thereto an order and decree cancelling and setting aside the deed executed by the Sheriff of Washington County, Oregon, conveying or attempting to convey title to the premises referred to in said bankrupts' petition and recorded on Book 159, Page 406 of the records of said County, and

Further Pray, That said M. R. Johnson and the United States National Bank of Portland, a corporation, be required to render a full and complete accounting of crops harvested and property removed from said farm and an order permitting the said bankrupts to the full benefits and provisions of the Frazer-Lemke Act as amended by Congress.

Martin J. Bernards, Petitioners; Glenn R. Jack of Attorneys for Bankrupts.

[fol. 42] *Duly sworn to by Martin J. Bernards. Jurat omitted in printing.*

[fol. 42½] [File endorsement omitted.]

Filed October 1, 1936. G. H. Marsh, Clerk. L. S. Rogers, Deputy.

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed September 19, 1936

H. A. Kuratli, Conciliator in Bankruptcy;

Joseph M. Loomis, Trustee in Bankruptcy in the above-entitled proceedings; and

Bagley & Hare, Attorneys for said Trustee;

You and each of you are hereby notified that the above-named bankrupts hereby appeal to the District Court of the United States for the District of Oregon from the orders heretofore entered by the Conciliation Commissioner appointing the trustee in bankruptcy which order and appointment was made on the 29th day of August, 1936, and the 3rd day of September, 1936, and hereby appeal from the entire order entered on said dates, and each and every portion thereof on the grounds and for the reason that the decree entered on the 29th day of August, 1936, is invalid and not based upon law or fact, and that the subsequent order appointing said trustee is invalid as not having been based upon the Frazier-Lemke Law as amended, or the bankruptcy law, or either of them.

(Signed) Martin J. Bernards, Lena Bernards.

[File endorsement omitted.]

Filed Oct. 1, 1936, G. H. Marsh, Clerk.

[fol. 44] *Duly sworn to by Martin J. Bernards and Lena Bernards. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONFIRMING ORDERS OF CONCILIATION COMMISSIONER— Filed December 15, 1936

Martin J. Bernards and Lena Bernards, the above-named bankrupts, having heretofore filed with H. A. Kuratlie, Conciliation Commissioner for Washington County, Oregon, Their petition for review in the form of and entitled "Notice of Appeal" from that certain order of said Conciliation Commissioner for Washington County, in the above-entitled cause, dated August 29, 1936, and that certain order of said Conciliation Commissioner dated September 4, 1936, and said Conciliation Commissioner having transmitted said petition or notice to this court, together with his certificate thereon, and the court having considered the same and being fully advised,

Now, Therefore, it is Considered and Ordered That the aforesaid orders of said Conciliation Commissioner be, and

they are hereby affirmed, and said petition or notice be, and it is hereby, denied.

Dated at Portland, Oregon, this 14th day of December, 1936.

James Alger Fee, Judge of the above-entitled Court.

[File endorsement omitted.]

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION—Filed January 4, 1937

To Honorable H. A. Kuratli, Conciliator for Washington County:

Comes now the above-named bankrupts and respectfully petition the United States Conciliation Commissioner-Referee for Washington County, State of Oregon as follows:

First. That your petitioners have duly filed their amended petition under Section 75, sub-section "s" of the Bankruptcy Act, known particularly as the Frazier-Lemke Farm Mortgage Act, and that the said petition was allowed as being properly filed and the bankrupts were duly adjudicated as bankrupts by the Honorable James Alger Fee and that the said petition has not been withdrawn, set aside or nullified by any United States Court, and that the said proceedings are now and have at all times in the past been in full force and effect.

Second. Your petitioners further respectfully request that the Conciliation Commissioner-Referee aforesaid immediately proceed with the appraisal of the bankrupts' property, as requested in amended petition.

Third. That the Order made and entered in August 8th appointing a trustee for the said bankrupts be held for [fol. 46] naught for the reason that the said Conciliation Commissioner has no authority under the Bankruptcy Act aforementioned to appoint a trustee, and for the further and separate reason that the said trustee was not appointed or elected by a majority in number or amount of the un-

secured creditors attending the said meeting, and that in support of this contention the bankrupts hereby refer to the affidavits marked exhibit "A" and "B" and "C" attached hereto, to which reference is hereby made and which are made a part thereof the same as if incorporated herein.

Fourth. And the bankrupts further request removal of the said trustee, for the reason that he is a party in interest with the chief creditor, M. R. Johnson, of the bankrupts' estate.

Fifth. That the trustee aforementioned be ordered to account to the Court for any and all properties seized by him or which came into his possession as such trustee, and in the event that any of such property has been disposed of by the said trustee that he shall account therefor to the Court and pay into the Court the proceeds realized from said sale, and that any property remaining in his possession shall be returned to the Court for the use of the bankrupts.

Sixth. That all of the bankrupts' exemptions be set aside to them and that the bankrupts be put into immediate possession of the whole of their estate subject to the encumbrances and the liens of the creditors.

Seventh. That M. R. Johnson be required to return to the Court for the benefit of the bankrupts' estate the following serially numbered bonds: Numbers 6-7-8-9-10-11 and 41 of the Water Works Extension of the City of Orenco of the Tualatin Valley, a municipal corporation of the State of Oregon. That the said bonds were placed by the bankrupts in the trust of M. R. Johnson prior to the filing of the first petition of the bankrupts herein, and that the said M. R. Johnson in violation of his trust wrongfully and unlawfully, without knowledge or consent of the bankrupts, pledged and hypothecated the said bonds to the United States National Bank of Portland, Ore., as collateral for a private loan from the United States National Bank to M. R. Johnson. That the cash value of the said bonds is in excess of the sum of \$7,000.00 with accrued interest.

Eighth. That the bankrupts be permitted to include in their schedule of assets a chose in action including three separate causes of action, the first cause of action for \$8200.00, the second cause of action for \$7000.00 and the third cause of action for \$3080.00 said chose of action being

the subject matter of the law action of Martin J. Bernards vs. M. R. Johnson now on file in the Circuit Court of the State of Oregon for Washington County, which action was for the wrongful and unlawful attachment of the bankrupts' personal property prior to the filing of the first petition in bankruptcy. That the said attachment was secured [fol. 48] by the false allegation that bankrupts' debt to M. R. Johnson was unsecured whereas it was secured by the pledge of good and sufficient collateral. That the said debt was obtained by M. R. Johnson on assignment for the purpose of securing the farm equipment of the debtors.

Ninth. That M. R. Johnson and Catherine Collins, mortgage creditors be required to return to the Court for the benefit of the bankrupts estate any and all crops or proceeds from crops and account for damages done to the bankrupts' estate because of their wrongful and unlawful possession of the bankrupts' premises and property in contravention to the bankrupts' rights under section 75 of the Bankruptcy Act. That the approximate measure of damages from the wrongful acts of M. R. Johnson and Catherine Collins cannot be summarized at this time.

Tenth. That the bankrupts pray for such order or orders as are necessary to carry out the intentions of the Bankruptcy Act, and the bankrupts further pray for such other and further ancillary relief and remedies as may be required.

(Signed) Martin J. Bernards, Lena Bernards.

[fol. 49] *Duly sworn to by Martin J. Bernards. Jurat omitted in printing.*

[File endorsement omitted.]

Filed February 4, 1937. G. H. Marsh, Clerk.

[fol. 50] EXHIBIT "A" TO PETITION

[Title omitted]

AFFIDAVIT

I, Francis Duyck, being first duly sworn, depose and say upon oath that I was present at a meeting of creditors held

before the Hon. H. A. Kuratli, Conciliator at Hillsboro, Oregon, on or about the 29th day of Aug. 1936; that I was acting as the duly appointed and qualified proxy of Lucy Duyck, my mother, who is an unsecured creditor of the above named bankrupts; that I first voted for Jos. M. Loomis, for trustee, but upon advice from Lucy Duyck, I withdrew the said vote for Jos. M. Loomis, and was advised by the Conciliator that the voting was not closed when I withdrew the said vote.

Francis Duyck, Affiant.

Subscribed and sworn to before me this 31 day of Dec., 1936. Rose Cave, Notary Public for Oregon. My Commission Expires Mch. 7, 1939. (Seal.)

[fol. 51]

EXHIBIT "B" TO PETITION

[Title omitted]

AFFIDAVIT

I, Charles Kyler being first duly sworn depose and say upon oath that I am an unsecured creditor of the above named bankrupts and that I attended a meeting of creditors at a hearing before the Hon. H. A. Kuratli, in Hillsboro, Oregon, on the 29th day of August 1936, at which time the election of a trustee was had; that I am a creditor of said bankrupts' estate for the sum of sixty (\$60.00) Dollars: that I did not cast a vote for Jos. M. Loomis for Trustee.

Charles Kyler, Affiant.

Subscribed and sworn to before me this 30 day of Dec., 1936. Rose Cave, Notary Public for Oregon. My Com. Expires Mch. 7, 1939. (Seal.)

[fol. 52]

EXHIBIT "C" TO PETITION

[Title omitted]

AFFIDAVIT

I, Winfred Dallmann being first duly sworn depose and say upon oath that I am an unsecured creditor of the above

named bankrupts and that I attended a meeting of creditors at a hearing before the Hon. H. A. Kuratli, in Hillsboro, Oregon, on the 29th day of August, 1936, at which time the election of a trustee was had; that I am a creditor of said bankrupts estate for the sum of seventy-five (\$75.00) dollars; that I did not cast a vote for Jos. M. Loomis for trustee.

Winifred Dallmann, Affiant.

Subscribed and sworn to before me this 2d day of January, 1937. C. J. Stickney, Notary Public for Oregon. My Comm. Expires May 25, 1937. (Seal.)

[fol. 53] STATE OF OREGON,
County of Multnomah, ss:

I, Wm. L. Brewster, hereby certify that I have accepted due service of the within petition by receiving a copy of the same prepared and certified to by ——— on the 4th day of Jan., 1937.

Wm. L. Brewster, Attorney for Catherine H. Collins.

STATE OF OREGON,
County of Washington, ss:

I, Geo. R. Bagley hereby certify that I have accepted due service of the within petition by receiving a copy of the same prepared and certified to by ——— on the 4th day of Jan., 1937.

Geo. R. Bagley, by N. E. Stangel, Attorney for Joseph M. Loomis, Trustee.

[fol. 54] STATE OF OREGON,
County of Washington, ss:

I, Martin Bernards, being first duly sworn depose and say that I presented the foregoing petition to E. B. Tongue, attorney for M. R. Johnson, on January 2nd and for acceptance of service; he refused to accept service and I then left a copy of the foregoing petition, prepared and certified to

by me as a true copy to E. B. Tongue, personally and in person.

Martin Bernards.

Subscribed and sworn to before me this 4th day of January, 1937. Rose Cave, Notary Public for Oregon. My Commission expires March 7, 1939. (Seal.)

STATE OF OREGON,
County of Washington, ss:

I, Martin Bernards, being first duly sworn, depose and say that I presented the foregoing petition to Arthur D. Platt, attorney for the United States National Bank, Portland, Oregon, on January 4th for acceptance of service; he refused to accept service, and I then left a copy of the foregoing petition, prepared and certified to by me as a true copy, to Arthur D. Platt, personally and in person.

Martin Bernards.

Subscribed and sworn to before me this 4th day of January, 1937. Rose Cave, Notary Public for Oregon. My Commission expires March 7, 1939. (Seal.)

Filed Feb. 4, 1937. G. H. Marh, Clerk, L. S. Robers, Deputy.

[fol. 55] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUSTAINING MOTION TO DISMISS PETITION—Filed January 11, 1937

At Hillsboro in said District, on this 11th day of January, 1937, I, H. A. Kuratli, Conciliation Commissioner and Referee in Bankruptcy in the above entitled cause, hereby certify:

That the petition of Martin J. Bernards and Lena Bernards, husband and wife; bankrupts, filed herein on the 4th day of January, 1937, praying for relief under Subsection "s" of Section 75 of the Bankrupt Act of possession of all of the property enumerated in the schedules of said bank-

rupts, for an order revoking the order of August, 8, 1936, for the removal of the Trustee, and for the return by M. R. Johnson of Warrants Nos. 6, 7, 8, 9, 10, 11, and 41 of the Waterworks Extension of the City of Orenco and for permission to include in their schedule of assets supposed claims against M. R. Johnson, and that Catherine Collins be required to turn over to the Court for the benefit of the bankrupts' estate all crops and proceeds of crops; coming on to be heard upon the motion of Joseph M. Loomis, Trustee [fol. 56] in Bankruptcy, to dismiss said petition upon the ground that all the matters and things set out in said petition have been previously adjudicated and no review thereof has been had, or if review was taken, such actions of the Referee have been approved on review; and the said bankrupts appearing in person and by B. G. Skulason, their counsel, and the said Joseph M. Loomis, Trustee, appearing by Bagley & Hare, his attorneys, and after hearing arguments of respective counsel,

It Is Now Ordered that the motion to dismiss said petition be and the same hereby is sustained for the reason that all matters and things in said petition alleged have heretofore been considered upon petition filed by said bankrupts and decided adversely to said bankrupts, and said orders have all become final and conclusive.

Dated this 11th day of January, 1937.

(Signed) H. A. Kuratli, Conciliation Commissioner
and Referee in Bankruptcy.

[File endorsement omitted.]

Filed February 4, 1937. G. H. Marsh, Clerk, by L. S. Rogers, Deputy.

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION—Filed January 13, 1937

To the Honorable James Alger Fee, Judge of Said Court:

Your petitioners respectfully represent that they are the bankrupts above named; that H. A. Kuratli, the commissioner before whom said matter is pending, has heretofore

held the present Frazer-Lemke Act unconstitutional, appointed a trustee and ordered him to sell all the personal property belonging to the bankrupts on the 14th day of January, 1937, at 10:00 o'clock A. M.; that your petitioners heretofore applied to said commissioner for an order restraining the trustee from making such sale, which petition was on the 11th day of January, 1937, by an order denied; that your petitioners have no opportunity because of lack of time to secure a review of said order before such sale is made; that they have in preparation a comprehensive petition for a review by this court of all the decisions of said commissioner including his holding that said Act is unconstitutional and such petition will be ready to file tomorrow. The said order of sale covers all the personal property of the bankrupts and if the same is made they will be left destitute, without furniture, adequate clothing or sufficient food for themselves and their six young children and they will be wholly deprived of all benefits under the Bankruptcy [fol. 58] Act. Reference is hereby made to the records and files in said matter.

Your petitioners, therefore, pray that an order issue immediately restraining the trustee from making said sale and that a date be fixed for him to show cause why such order should not be made permanent.

B. G. Skulason, Attorney for Petitioners.

Duly sworn to by B. G. Skulason. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 59] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING PETITION FOR RESTRAINING ORDER—January 13, 1937

Now at this day come the above named bankrupts by Mr. B. G. Skulason, of counsel, and present to the court a petition praying that a restraining order issue out of this court temporarily restraining the conciliation commissioner from selling the personal property of the bankrupts and for an

order for the trustee herein to show cause why said restraining order should not be made permanent, Mr. Arthur D. Platt appearing for the creditors; and the court having heard the arguments of counsel, it is Ordered that said motion be and the same is hereby denied.

(Signed) James Alger Fee, Judge.

Filed January 14, 1937. G. H. Marsh, Clerk, by L. S. Rogers, Deputy.

[fol. 60] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR REVIEW—Filed January 29, 1937

To the Honorable James Alger Fee, Judge of Said Court:

Your petitioners, the above named bankrupts, respectfully request a review of the order of Honorable H. A. Kuratli, Conciliation Commissioner in said matter dated and entered on the 11th day of January, 1937, granting a motion of the trustee herein to dismiss their petition of January 4, 1937 filed with said commissioner, and your petitioners hereby except to said order and assign error as follows. The said commissioner erred in granting said motion and dismissing said petition on the following grounds:

(a) Your petitioners are farmers and have filed their petition in bankruptcy under, and are entitled to relief under sub-section (s) of Section 75 of the Bankruptcy Act and have in all things complied with the provisions of the law in the premises.

(b) In failing to proceed with the appraisal of the property of the bankrupts.

(c) In refusing to declare void the order appointing a trustee.

(d) In refusing to order said trustee to account for properties of the bankrupt seized by him or coming into his possession or for the proceeds of any sale by him of such property.

(e) In refusing to set aside the exemptions of the petitioners and to put them as such bankrupts into possession of their whole estate.

(f) In refusing to consider the matter of a return to the bankrupt estate by M. R. Johnson of the bonds mentioned in the seventh paragraph of the petition.

(g) In refusing to include as part of the bankrupt estate the choses in action mentioned in paragraph eight of the petition.

(h) In refusing to order the creditors, M. R. Johnson and Catherine Collins, to return to said estate all crops and proceeds of crops, and account for damage to the bankrupt estate as specified in paragraph ninth of the petition.

Skulason & Skulason, Attorneys for Bankrupts.

[File endorsement omitted.]

Filed, February 4, 1937. G. H. Marsh, Clerk.

Duly sworn to by Martin J. Bernards. Jurat omitted in printing.

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO SET ASIDE ALL ORDERS OF COURT—Filed April 13, 1938

Comes now bankrupts and moves to vacate and set aside all orders of this Court, and of all the Referees and Conciliation Commissioners where it was sought to set aside or delay the carrying out any of the provisions of the Bankrupt Act particularly the provisions of section 75 of the Bankrupt Act and this cause be promptly reinstated without any additional filing fees or charges.

W. E. Richardson, Attorney for Bankrupts.

Points Relief Upon:

1. That the Referee in Bankruptcy and the Conciliation Commissioners had no jurisdiction to pass on the adjudi-

cation of Bankrupts of the qualifications of Bankrupts to come under Sec. 75 of the Bankrupt Act.

2. That the Referee in Bankruptcy and Conciliation Commissioners had no jurisdiction to proceed until they had complied with the man-atory provision of Bankrupt Act and particularly the provisions and the amendments of Sec. 75 of the Bankrupt Act.

3. Amendments of Sec. 75 of Bankrupt Act Chapter 41—3rd Session of 75th Congress and Approved March 4th, 1938.

4. That after adjudication no further affirmative action by the petitioners is necessary until the Referee and Conciliation Commissioners had complied with the mandatory provisions of the Bankrupt Act and particularly Section 75.

W. E. Richardson, Attorney for Bankrupts.

I hereby certify that the foregoing motion is, in my opinion, well founded in law.

W. E. Richardson, Of Attorney for Bankrupts.

[File endorsement omitted.]

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY—Filed April 31, 1938

Comes now bankrupts and in reply to all answers on file herein denies each and every allegation thereof except as alleged in bankrupts petition.

(Signed) W. E. Richardson, Attorney for Bankrupts.

† [File endorsement omitted.]

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION—Filed February 8, 1935

To the Honorable Judges of the District Court of the United States, for the District of Oregon, and to Willard L. Marks, Referee in Bankruptcy in said District:

The petition of Martin J. Bernards and Lena Bernards, the above named bankrupts, respectfully represents and shows:

That heretofore they have filed herein their petition for compromise and extension of their debts; that as a result of proceedings duly had and taken, and before the Conciliation Commissioner of the County of Washington and State of Oregon, petitioners have failed to obtain acceptance of their proposals of composition and extension of debts by a majority in number and amount of all creditors whose claims were affected by such proposed composition and extension;

That thereafter, and in due course, they amended their petition and asked to be adjudged bankrupts; that an adjudication of bankruptcy was duly made and entered herein and that said proceedings have been referred to Willard L. Marks, one of the duly appointed and qualified referees in bankruptcy in the District of Oregon;

That said referee in bankruptcy has appointed Friday, the 3th day of February, 1935, at 2:00 o'clock in the afternoon, the county court room of the Washington County Court House at Hillsboro, in the District of Oregon, as the time and place for the first meeting of the creditors of the bankrupts:

That your petitioners desire that all of the property owned by them and described in their schedules attached to the amended petition, whether pledged, encumbered or unencumbered by liens, or otherwise, be appraised, and that appraisers be appointed to make such appraisal; and that your petitioners be allowed to retain possession of all of said real and personal property and pay for the same under the terms and conditions set forth in subsection (s) of Section 75 of the Bankruptcy Act;

Wherefore, Your Petitioners pray that appraisers be appointed herein for the appraisal of all of the property

of the bankrupts, whether pledged, encumbered or unen-
[fol. 66] cumbered by liens, or otherwise, and that the
petitioners be allowed to retain possession of all of their
property and pay for the same under the terms and con-
ditions set forth in subsection (s) of Section 75 of the
National Bankruptcy Act; and that petitioners be granted
such other and further relief as may be necessary, appro-
priate and equitable herein.

Martin J. Bernards, Lena Bernards, Petitioners.
J. P. Kavanaugh, R. N. Kavanaugh, Attorneys
for Petitioners.

*Duly sworn to by Martin J. Bernards and Lena Bernards.
Jurat omitted in printing.*

[File endorsement omitted.]

Filed October 10, 1935, and forwarded to Con. Com.

G. H. Marsh, Clerk.

Received from Con. Com. and filed July 29, 1938.

G. H. Marsh, Clerk, by L. S. Rogers, Deputy.

[fol. 67] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF OREGON

No. B-19268

In the Matter of MARTIN J. BERNARDS and LENA BERNARDS,
Bankrupts

ORDER AND DECREE—Filed May 10, 1938

This matter coming on to be heard before the Honorable
James Alger Fee, judge of the above entitled court, upon
the motion of Catherine H. Collins, M. R. Johnson and
The United States National Bank of Portland (Oregon)
and J. M. Loomis, trustee, appearing by their respective
attorneys for an order and decree herein based upon the
findings of fact and conclusions of law made and filed
herein, and the same having been duly considered:

It is hereby ordered, adjudged and decreed:

1. That the bankrupts' petition filed January 15, 1937
be dismissed.

2. That bankrupts' motion filed April 13, 1938 to vacate and — aside all orders of this Court, etc. be denied.

3. That the title to the real property situated in Washington County, Oregon, hereinbefore described and referred to in Finding of Fact XV and elsewhere in these bankruptcy proceedings as Parcel 15, be and it is hereby decreed to be in Catherine H. Collins free and clear from all right, title and interest of said bankrupts under this bankruptcy proceeding.

4. The title to the real property in Washington County, [fol. 68] Oregon, hereinbefore described and referred to in Finding XV and elsewhere in these bankruptcy proceedings as Parcels 1-14, inclusive, and Parcel 16, be and it is hereby decreed to be in M. R. Johnson and The United States National Bank of Portland (Oregon) free and clear of all right, title and interest of Martin J. Bernards and Lena Bernards under this bankruptcy proceeding.

5. That the actions of the trustee in taking possession of and selling and disposing of the personal property listed and enumerated in the bankrupts' schedules and the payment and expenses of said proceeding set forth in the trustee's answer be ratified and confirmed.

6. That the election by the creditors, confirmation by the Conciliation Commissioner and qualification of J. M. Loomis, as Trustee of the bankrupt estate of Martin J. Bernards and Lena Bernards, is in all things regular, and be, and hereby are, confirmed.

7. That the orders of the Conciliation Commissioner hereinbefore made *by* ratified and approved, and that said orders and the orders of this Court herein be a bar to any further proceedings on the part of the said bankrupts under subdivision "s" of Section 75.

8. That the trustee herein proceed as by law required to pay any additional expenses necessary for him to incur, the trustee's compensation and the fees for his attorney. [fol. 69] the preferred claims and thereupon distribute the remainder of the moneys in his hands to the common creditors of said bankrupts whose claims have been presented and allowed prorata; and otherwise the trustee and Conciliation Commissioner shall take such proceedings as

will speedily complete and close this bankruptcy proceeding.

Dated this 10th day of May, 1938.

(Signed) James Alger Fee, District Judge.

[File endorsement omitted.]

[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AFFIRMING ORDER OF CONCILIATION COMMISSIONER—
Filed May 10, 1938

Martin J. Bernards and Lena Bernards, the above named Bankrupts, having heretofore filed with H. A. Kuratli, Conciliation Commissioner for Washington County, Oregon, their petition for review of that certain order of said Conciliation Commissioner, dated the 11th day of January, 1937, denying the petition of said bankrupts, filed with said Commissioner on the 4th day of January, 1937, and said Conciliation Commissioner having duly certified such cause and therewith transmitted said petition, the motion to dismiss the same, and the order of dismissal:

And the Court having considered the same and the arguments of respective counsel, and being now fully advised:

Now, Therefore, it is Considered and Ordered that the order of the Conciliation Commissioner of Washington County, Oregon, dated the 11th day of January, 1937, dismissing the petition of said bankrupts, filed on January 4th, 1937, be, and the same hereby is affirmed;

And it is Further Ordered that the said Bankrupts are not [fol. 71] entitled to the relief, or any part thereof, sought in said petition so filed with said Commissioner on January 4th, 1937.

Dated at Portland, Oregon, on this 10 day of May, 1938.

(Signed) James Alger Fee, Judge of the Above Entitled Court.

[File endorsement omitted.]

[fol. 72] IN UNITED STATES DISTRICT COURT

[Title omitted]

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Filed April 25, 1938

Comes now the bankrupts by their attorney W. E. Richardson, and objects to the Findings of Fact and Conclusions of Law on file herein, for the reason that:

1. The bankrupts by their attorney, W. E. Richardson, at the trial of the issues of law and fact in this matter, which were heard before this Court April 13, 1938, did not admit the validity of any proceedings or orders made and entered by the Court or the Conciliation Commissioner.
2. The bankrupts by their attorney only waived the presentation of certain documentary evidence relating to the foreclosure and sale of the bankrupts' property in the above entitled Court and the State Courts of the State of Oregon, for the county of Washington, and by such waiver did not require any of the parties in interest to produce in Court such documents as related to the sale and foreclosure of bankrupts' property.

W. E. Richardson, Attorney for Bankrupts.

Dated at Portland, Oregon, this 25th day of April, 1938.

[File endorsement omitted.]

[fol. 73] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed September 10,
1938

To the Clerk of the United States District Court for the
District of Oregon:

You are hereby requested, pursuant to a request from Paul P. O'Brien, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under date of September

1, 1938, to prepare and certify a transcript of all of the papers included in the Appellants' list of papers and orders filed with the Circuit Court of Appeals to enable the Court to exercise its discretion in considering the petition for appeal. Said papers and orders were filed upon the following dates:

1. Debtors' Petition, less schedules, filed Aug. 10, 1934.
2. Restraining Order and Service filed Aug. 10, 1934.
3. Order of Reference to the Conciliation Commissioner, filed Aug. 10, 1934.
4. Order dismissing Conciliation Commissioner, filed Oct. 17, 1934.
5. Petition for re-reference, filed Oct. 27, 1934.
6. Order of Re-reference, filed Oct. 29, 1934.
- [fol. 74] 7. Final Report of the Conciliation Commissioner, filed Dec. 17, 1934.
8. Amended Petition, filed Dec. 19, 1934.
9. Order of Adjudication of Martin J. Bernards, Dec. 19, 1934.
10. Order of Adjudication of Lena Bernards, Dec. 19, 1934.
11. Order of Reference to Marks, filed Dec. 19, 1934.
12. Order appointing appraisers to Marks (May 1935?).
13. Petition filed Sept. 30, 1935.
14. Order of Re-reference to Kuratli, filed Sept. 10, 1935.
15. Formal Order of Reference to Kuratli, filed Oct. 15, 1935.
16. Bankrupts' Petition to Kuratli of July 15, 1936, (filed in District Court Oct. 1, 1936).
17. Bankrupts' Notice of Appeal from Appointment of Trustee, (filed with Kuratli Sept. 19, 1936) Filed Oct. 1, 1936.
18. Fee's order approving Trustee, filed Dec. 15, 1936.
19. Bankrupts' Petition of Jan. 4, 1937, filed with Kuratli same date. Filed with District Court Feb. 4, 1937.
20. Conciliation Commissioner's Order of Jan. 11, 1937, filed with Kuratli same date. Filed with District Court Feb. 4, 1937.
21. Bankrupts' Petition for Restraining order of sale of Personal Property filed Jan. 13, 1937.
22. Fee's Order Denying Restraining Order, filed Jan. 13, 1937.
23. Petition for Review to Fee, filed Jan. 15, 1937.

24. Motion filed Apr. 13, 1938.
25. Reply to Answer, filed Apr. 13, 1938.
26. Order and Decree, filed May 10, 1938.
27. Order Affirming Conciliation Commissioner, filed May 10, 1938.

In addition to the above the Appellants request a transcript of the following papers:

[fol. 75] 28. Schedule "a" of Amended Petition of Unsecured Debts, only, filed Dec. 19, 1934.

29. Petition to the Court and to the Referee for Appraisal of Property, filed Willard Marks on Feb. 8, 1935. Filed in the District Court Oct. 10, 1935.

30. Objections to the Findings of Fact and Conclusions of Law, filed Apr. 25, 1938.

31. Bankrupts' reply filed with Kuratli August 8, 1936 and filed with District Court, October 1, 1936.

Martin J. Bernards, One of the Appellants.

[File endorsement omitted.]

[fol. 75a] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To G. M. Marsh, Clerk of the U. S. District Court for the District of Oregon:

Please prepare transcript of record on appeal the following papers, to be added to the appellants Apostles of Records now on file in the above entitled Court:

1. The Bankrupts' Schedule of personal property in the Bankrupts' Amended Petition.

Signed, Martin J. Bernards, One of Appellants.

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[fol. 76] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed by and between the parties hereto as follows :

That the parties waive any requirement to include in the transcript of record the schedules attached to the petitions of the debtors and the detailed description of real property wherever the same occurs.

That any requirement as to inclusion of acceptance of services of papers by the several parties be waived.

That the Clerk of the District Court of the United States for the District of Oregon *by* relieved of any responsibility and liability by the omission of the foregoing record herein.

Dated this 14th day of September, 1938.

Martin J. Bernards, for Appellants. W. L. Brewster, for Catherine H. Collins. Platt, Platt and E. B. Tongue, for M. R. Johnson and United States National Bank. Bagley & Hare, for Trustee.

Unsecured debts of schedule "A," and personal property of schedule "B," are to be included in transcript.

Martin J. Bernards.

[fol. 77] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 78] SCHEDULE "B"

(10)

Personal Property

85 acre crop of hairy vetch severed from land and sold to I. C. Sanford of Portland, Oregon, at 6¼¢ (six and one-fourth cents) per pound. \$500.00 advanced on purchase price and balance of purchase price will depend on final statement of weights Sanford paid since filing original petition.

50 acres of oats and Austrian Peas; 10 tons of said peas sold to I. C. Sanford at \$2.60 per 100 pounds, along with the aforesaid hairy vetch and subject to said \$500.00 advance on such purchase price; about 40 to 50 tons of oat seed and feed separated from said Austrian Peas and vetch. Sanford paid since filing original petition.

100 acres of Victory Oats; 43 tons sold to Kerr-Gifford Co. for \$926.00; \$500.00 advanced against said sum for harvesting purposes and balance used also for harvesting purposes.

90 acres of Barley harvested; 40 tons sold to I. C. Sanford of Portland, Oregon, for \$1600.00, 11 tons on hand, purchase price received and used for seeding and operating.

550 tons of chopped hay.

2 tons of vetch seed.

110 tons baled straw.

4 horses.

1 cow.

235 ewes.

185 Lambs.

Said ewes and lambs mortgaged to Peter Bergersen. Amount due on note and mortgage \$1,340.82.

1 Caterpillar 34 combine, with pickup attachment and grain, grading attachment.

1 T A 40 International Tractor, Crawler type.

1 22-36 International Tractor.

1 15-30 International Tractor.

[fol. 79] 2 Big Six McCormick-Deering Mowers.

1 12-foot McCormick-Deering Rake.

1 4-bottom 16 inch John Deere Tractor plow.

1 3-bottom 14 inch John Deere tractor plow.

1 Fapce 3 row Hay cutter.

1 28-foot Corrugated Roller.

1 22-foot Spring tooth harrow.

1 33-foot Six Section Peg tooth harrow.

1 10-foot Van Bunt Drill.

1 7-foot Wooden Roller.

2 8-foot 22-inch Tandems Cover crop Discs.

1 14-inch walking plow.

1 10-foot 16 inch Tandems Tractor.

1 16-inch walking plow.

1 16-foot land plaster seeder. Disc.

1 hay Tedder.

1 3-horse McCormick-Deering Cultivator, 2 row.

- 2 2-horse cultivators.
- 2 1-horse cultivators.
- 1 1-horse clod smasher.
- 1 1-horse weeder.
- 1 set chop tools.
- 1 clipper power fanning mill.
- 1 hand fanning mill.
- 2 3-horse power single phase motor.
- 2 sets harness.
- 3 wagons.
- 3 hay racks.
- [fol. 80] 1 3½ Bain wagon and box.
- 1 Universal logging trailer.
- 2 5-ton white trucks, 1925 models.
- 1 3½-ton white truck 1921 model.
- 2 3-ton Packard trucks 1918-1919 models.
- 1 1928 Buick Sedan automobile.
- 1 1933 Ford pickup automobile.
- 1 3300-gallon gasoline tank.
- 1 5000-gallon gasoline tank.
- 1 11 x 12 Fairbanks-Morse Air Compressor.
- 2 water pumps.
- 1 air tank, 18 inches by 6 feet.
- 1 Fairbanks Scales, 3 by 4 foot platform.
- 1 Upright Steam Boiler, 6 horse.
- 115 Cords wood mortgaged to Patricia Duyck for \$175.00.
- 2 miles fencing.
- 1 Fodder chopper.
- 1 new Fertilizer spreader, purchased on conditional sales contract from John Deere Plow Co., balance due \$140.00.
- 1 used fertilizer spreader.
- 1 blower at American Sheet Metal Works, Portland, Oregon.

Water Works Extension Bonds of City of Orenco of Tualatin Valley, a municipal Corporation of the State of Oregon as follows: Nos. 6, 7, 8, 9, 10, 11, and 41 for \$1000.00 each. \$400.00 has been paid on account of No. 6 leaving a balance of \$600.00; together with coupons attached to each bond. Said bonds are pledged with United States National Bank of Portland, (Oregon) as security for payment of loan of M. R. Johnson to said United States National Bank of Portland, (Oregon).

[fol. 81] The following described real property has been attached by petitioner Martin J. Bernards in an action in

the Circuit Court of the State of Oregon for the county of Washington which is now pending, to wit:

1. Beginning on the west side of Chestnut Street in the City of Orenco, at a point 60 feet north of Block One (1) of the original townsite of Orenco; thence westerly on the north line of First Street 1015 feet to the Hillsboro Road; thence north 90 feet to the south line of the Oregon Electric Railroad right-of-way; thence easterly along said right-of-way to a point on west line of Chestnut Street; thence South 10 feet to the place of beginning containing 1,167 acres in Section 27, Township 1 North of Range 2 West of the Willamette Meridian.

2. Beginning at the Southeast corner of Lot No. two (2) in Boharts Subdivision; thence north along the east line of Lot No. two (2) to the South line of the Oregon Electric Railroad right-of-way; thence west along said right-of-way to the west line of Lot No. two (2); thence south to the Southwest corner of Lot No. two (2).

3. Beginning at a point on the north boundary line of the Oregon Electric Railroad right of way 230 feet north and 60 feet west of the Northwest corner of Block three (3) in the Orenco Townsite; thence in a westerly direction along the north boundary line of said right-of-way to a point on the west boundary line of the Geo. W. Ebbert's Donation Land claim where said boundary line of said Donation Land claim intersects the said right-of-way; thence North following the west line of said Donation Land Claim 200 feet thence in an easterly direction 200 feet north of and parallel with the north boundary line of the Oregon Electric Railroad right-of-way to the west boundary line of Robert Schneider tract of land as described in Book 88, page 596, of the Deed Records of Washington County; thence south and east following this boundary line of the said Robert Schneider tract to the southeast corner of said tract; thence south 30 feet to the place of beginning.

The following described household furniture contained in the residence of the petitioners at Orenco, Washington County, Oregon:

- 1 Universal Range.
- 1 Heater.
- 1 Davenport.
- 2 Overstuffed Chairs.

[fol. 82] 1 Overstuffed Rocker.

1 Dining Room Set.

1 Oak Rocker.

1 Wicker Chair.

1 Wicker Rocker.

1 Library Table.

1 Pool Table 3½ x 7.

1 Mahogany Bedroom Set.

4 Bedsteads.

1 Typewriter.

1 Adding Machine.

1 Edison Radio.

1 Piano.

1 Phonograph.

1 Maytag Electric Washing Machine.

3 Rugs.

Small Library.

Linens.

Dishes, crockery, cooking utensils, silverware.

Unpaid Accounts

City of Orenco, Judgment \$30.00.

Leveret Adams, Hillsboro, Nursery stock \$30.00.

K. E. Krause, Spokane, Washington, Nursery stock \$300.00.

J. B. Pilkington, Portland, Nursery stock \$75.00.

Shorty Beard, Forest Grove, Nursery stock \$8.00.

Dr. Via, Forest Grove, Nursery stock \$10.50.

Freeman & Munger, Perry, Okla., Peas \$95.00.

Loggers & Contractors Machinery Co., Portland, Combine parts \$12.00.

[fol. 83] Wheat allotment \$280.00. Disallowed since filing original petition.

R. F. McKnight, Orenco, combine parts \$186.00; paid since filing original petition.

Alvin Kolick, Orenco, prune seed \$17.00.

M. A. Chrisman, Portland, Nursery stock \$125.00.

Marylhurst College, Oswego, nursery stock, \$22.00.

Duly sworn to by Martin J. Bernards. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 84] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DISSOLVING RESTRAINING ORDER AGAINST J. W. CONNELL, SHERIFF OF WASHINGTON COUNTY, OREGON—Filed December 18, 1935

An order having been made and entered herein on October 3, 1935, upon the application of the above named bankrupts, temporarily restraining J. W. Connell, Sheriff of Washington County, Oregon, from executing a writ of assistance issued out of the Circuit Court of the State of Oregon for the Nineteenth Judicial District (Washington County) in a cause entitled, "M. R. Johnson and The United States National Bank of Portland (Oregon), plaintiffs vs. Martin J. Bernards, et al., defendants", requiring said sheriff to oust said bankrupts from the possession of certain real property described in the original and amended petition herein and requiring him to show cause why said order should not be made permanent, and said sheriff having appeared herein and filed his answer thereto the issue made thereby was, on October 11, 1935, duly argued and submitted to the court, said J. W. Connell, Sheriff, appearing by E. B. Tongue and A. D. Platt, of his attorneys of record, and said bankrupts appearing by J. P. Kavanaugh, of their attorneys of record, and, briefs having been filed, the matter was taken under advisement by the court and the court being now fully advised; and

[fol. 85] It Appearing Further to the Court that said real property was sold by said sheriff prior to the issuance of said restraining order to M. R. Johnson and The United States National Bank of Portland (Oregon) under and pursuant to an execution issued out of said Circuit Court, pursuant to a decree duly made and entered in said court, that said sale was duly confirmed by said Circuit Court and that said Circuit Court had jurisdiction over said suit and the parties thereto and the subject matter thereof, which jurisdiction it acquired prior to the commencement of any of the proceedings herein, and that by reason thereof the threatened acts of the Sheriff of Washington County (Oregon) would not constitute an interference with any property of the bankrupt as defined by the Acts of Congress.

It is hereby Considered and Ordered that said temporary restraining order, and the whole thereof, be, and it is, hereby vacated and set aside and that the application of said bankrupts for the continuance of said restraining order be, and it is, hereby denied.

Dated at Portland, Oregon, this 18th day of December, 1935.

James Alger Fee, United States District Judge.

[File endorsement omitted.]

[Vol. 86] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF OREGON

B-19268

In the Matter of Martin J. Bernards and Lena Bernards,
Bankrupts

DECREE—Filed August 8, 1936

Now at this time this matter coming on for hearing upon the petition of the bankrupts filed herein on the 15th day of July, 1936, and the answer thereto and cross petition filed herein on behalf of M. R. Johnson and The United States National Bank of Portland (Oregon), a corporation, and the reply to said answer and petition, the above named bankrupts appearing in person and by Glenn B. Jack, their attorney, and the said M. R. Johnson and The United States National Bank of Portland (Oregon), a corporation, appearing in person and by E. B. Tongue, their attorney, and the Court having heard all the evidence introduced by and on behalf of the said bankrupts, and the said M. R. Johnson and The United States National Bank of Portland (Oregon), a corporation, and the admissions of the bankrupts, and the arguments of Counsel, and after having made an examination of the records herein, and from said petition, answer, reply and other evidence introduced herein on behalf of the respective parties, it appears to the Court:

I to XXI (Incl.) omitted.

That since the filing of said schedules by the above named bankrupts, said bankrupts have used and converted to their own use much of the property shown in said schedules and have received from a portion of said personal property an amount in excess of \$5000.00, and the remainder of said personal property is fast depreciating in value and will be lost or destroyed unless a trustee is appointed to take possession thereof, and that there is no reasonable hope of the rehabilitation of said bankrupts within the meaning of said section 75 of the Bankrupt Laws of the United States of America.

XXIII

That the said bankrupts have never at any time, pursuant to sub-section (s) of Section 75 of an act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", which sub-section was approved August 28, 1935, filed a petition in this court praying that all their property, wherever located, whether pledged, encumbered or unencumbered, be appraised and that their unencumbered exemptions, and unencumbered interest or equity in their exemptions, as prescribed by State law, be set aside to them, and that they be allowed to retain possession under the supervision and control of the court, or any part or parcel or all of the remainder of their property, including their encumbered exemptions, under the terms and conditions set forth in said section.

XXIV

That this court has not at any time designated and appointed [fol. 88] pointed appraisers who have appraised the property of said bankrupts, and the property of these bankrupts has never been appraised by any appraisers appointed by this court under said sub-section (s) of said Section 75.

XXV

That this court has never at any time, through a referee in bankruptcy or Conciliation Commissioner, issued an order setting aside to said bankrupts their unencumbered exemptions or their unencumbered interest or equity in their exemptions as prescribed by State law.

XXVI

That this court has not at any time, through any referee in bankruptcy, Conciliation Commissioner or otherwise, made any order that possession of the bankrupts property should be under the supervision and control of this Court, or that any part or parcel thereof, or all of the remainder of the bankrupts' property shall remain in the bankrupts as provided under said Section 75.

XXVII

That this court has not at any time, through a referee in bankruptcy or Conciliation Commissioner, or otherwise, made any order staying all judicial or official proceedings in any court, or under the direction of any official, against the bankrupts or any of their property for a period of three years, or any other time.

XXVIII

That this court has not at any time, through a referee in bankruptcy or Conciliation Commissioner, or otherwise, fixed a reasonable rental to be paid by said bankrupts for any of the property mentioned in said schedules.

[fol. 89]

XXIX

That this court has not at any time, through a referee in bankruptcy or Conciliation Commissioner or otherwise, made any order permitting the bankrupts to retain possession of their property or any part or parcel thereof in the custody or under the control of this court.

XXX

That no proceedings have at any time been instituted, and no orders of any kind or character have been made by this court, pursuant to said sub-section (s) of said section 75, as amended by the Act approved on August 28, 1935, except the order recalling the proceedings from Willard Marks and referring said proceedings to H. A. Kuratli, Conciliation Commissioner.

XXXI

That from the schedules of the bankrupts on file herein, the said bankrupts, aside from said Parcels Nos. 1, 2, 3, 4,

5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 own no interest in any farm or agricultural lands except an undivided one-eighth interest in the following described lands to wit:

Being that part of the Donation Land Claim of S. J. N. Beeks No. 79 in Township one North of Range three West of Willamette Meridian bounded and described as follows: Beginning at the northeast corner of said claim No. 79, running thence west on the north line of said claim 10.63 chains to the southeast corner of the Henry Black Donation Land Claim; thence south $75^{\circ} 30'$ West 24.12 chains; thence South $0^{\circ} 30'$ West on east line of a tract of land owned by Theo. Bernards 44.54 chains to a post on the north line of J. Butts Donation Land Claim; thence east on such north line 34.90 chains to a stone; thence North $0^{\circ} 40'$ west 50.86 chains to the place of beginning, containing 167.70 acres;

That the lands hereinabove last described is designated in the schedule of the bankrupts on file herein as Parcel No. 17 and that the title to said Parcel No. 17 is held by eight heirs of — Bernards in common; that the bankrupts [fol. 90] have not used or occupied said farm since the year 1930, and that said land last hereinabove described since 1930 has been rented to one Lepschat, brother-in-law of the bankrupt, Martin J. Bernards, and that at no time since 1930 has the said Martin J. Bernards received in cash any sum or amount whatsoever as rental from the said Lepschat; that said land last hereinabove described is subject to a mortgage executed by the said bankrupts to one F. J. Vanderzanden for the sum of \$1500.00 executed on December 3, 1932, upon his own undivided one-eighth interest therein.

XXXII

That the said bankrupts are not farmers within the meaning of sub-section (s) of Section 75 as amended and approved August 28, 1935.

XXXIII

That upon the 28th day of August, 1935, the said bankrupts, Martin J. Bernards and Lena Bernards, had only an equity of redemption in and to the lands described in said decree, a copy of which is hereinabove set forth, except tract No. 15.

XXXIV

That sub-section (s) of said Section 75 as amended and approved on August 28, 1935, so far as the same would apply herein, is unconstitutional and void.

XXXV

That no legal or valid offer of composition or extension has ever been made in good faith and in compliance with said Section 75 of the said Bankrupt Act.

It is therefore Ordered and Adjudged that this Court is not now nor has it had since the 29th day of June, 1935, [fol. 91] any jurisdiction of the real property set forth in said decree, a copy of which is hereinabove set forth.

It is further Ordered and Adjudged that the said bankrupts have no right, title or interest in or to any of the real property set forth in said decree except Tract No. 15.

It is further Ordered and Adjudged that no legal or valid offer of composition has ever been made by the bankrupts to their creditors.

It is further Ordered and Adjudged that said sub-section (s) of Section 75 of the Bankrupt Laws as amended and approved on August 28, 1935, has no application to the real property described in said decree hereinabove set forth.

It is further Ordered and Adjudged that said bankrupts are not farmers within the meaning of said sub-section (s) of said Section 75 of the Bankrupt Laws as amended and approved on August 28, 1935.

It is further Ordered, Adjudged and Decreed that the above named bankrupts are not entitled to the benefits of the provisions of sub-section (s) of said Section 75 of the Federal Bankrupt Law as amended and approved on August 28, 1935, and that said petition of bankrupts be and hereby is denied.

It is further Ordered, Adjudged and decree that a trustee be appointed of all the personal property of said bankrupts and that it be sold or otherwise disposed of for the purpose of liquidating the debts of said bankrupts.

Dated this 8th day of August, 1936.

H. A. Kuratli, Conciliation Commissioner.

[File endorsement omitted.]

Filed October 1, 1936. G. H. Marsh, Clerk, by L. S. Rogers, Deputy.

[fol. 92] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPOINTING TRUSTEE—Filed August 29, 1936

At Hillsboro, Oregon, in said District, on the 29th day of August, 1936, before me, H. A. Kuratli, Conciliation Commissioner in Bankruptcy, a meeting of the creditors of the above named bankrupts having this day been held in the County Court House in the City of Hillsboro, County of Washington, State of Oregon, pursuant to a notice duly and legally given and served upon each and all of the creditors of the above named bankrupts shown in their said schedule, and it appearing that there are some assets available to the creditors of the above named bankrupts and that Joseph Loomis has been elected trustee of the estate of the above named bankrupts by the creditors of the above named bankrupts on this date,

Now Therefore, It Is Hereby Ordered that I do hereby appoint Joseph Loomis of Forest Grove, Oregon, in the County of Washington, State of Oregon, as trustee of the estate of the above named bankrupts, and that the bond of said trustee be and hereby is affixed in the sum of one thousand and no/100 (\$1000.00) dollars.

Dated this 29th day of August, 1936.

H. A. Kuratli, Conciliation Commissioner in Bankruptcy.

[File endorsement omitted.]

Filed October 1, 1936. G. H. Marsh, Clerk.

[fol. 93] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPROVING TRUSTEE'S BOND—Filed September 3, 1936

It appearing to the Court that Joseph M. Loomis of Forest Grove, Oregon, in said District of Oregon, has been duly appointed Trustee of the Estate of the above named Bankrupts, and has given a bond, with Commercial Casualty Insurance Company, a corporation, as Surety, for the

faithful performance of his official duties in the amount fixed by the order of this Court, to-wit: in the sum of \$1,000.00;

It Is Now Ordered that said bond be and the same hereby is approved.

Dated this 3rd day of September, 1936.

H. A. Kuratli, Conciliation Commissioner and Referee for the County of Washington.

[File endorsement omitted.]

Filed October 1, 1936. G. H. Marsh, Clerk, by L. S. Rogers, Deputy.

[fol. 94] IN UNITED STATES DISTRICT COURT

[Title omitted]

CERTIFICATE ON REVIEW—Filed October 1, 1936

To the Honorable John H. McNary and James Alger Fee, Judges of the above entitled Court:

I, H. A. Kuratli, Conciliation Commissioner and Referee in Bankruptcy, to whom was referred and who is now in charge of the proceedings in the above entitled cause, for the purpose of review of a portion of said proceedings, Do Hereby Certify:

That in the course of said proceedings herein, and based upon the petition, answer and reply hereinafter set forth, and upon the evidence taken and heard on behalf of said bankrupts, and their admissions in open Court, and the testimony taken on behalf of the petitioners, M. R. Johnson and The United States National Bank of Portland (Oregon), an order was made and entered on the 8th day of August, 1936, adjudging Martin J. Bernards and Lena Bernards, the above named bankrupts, are neither farmers or stock raisers within the embrace of the Act of Congress in relation to Bankruptcy, particularly subdivisions "R" and "S" of Section 203, Title 11 thereof, known as the second Frazier-Lemke Amendment, and are not entitled to [fol. 95] the benefits of said second Amendment, and adjudging that Martin J. Bernards and Lena Bernards are without any right, title or interest in or to the tracts of real property described in *in* schedule "B", numbered 1

to 16, inclusive, a copy of which order is hereto annexed, and that thereafter, towit: on the 29th day of August, 1936, at a meeting of the creditors of the bankrupts, upon notice duly given, the creditors of the above named bankrupts unanimously elected one Joseph M. Loomis to act as trustee of the estate of the above named bankrupts, and upon said date, towit: the 29th day of August, 1936, an order was made and entered in the above entitled matter wherein the appointment of the said Joseph M. Loomis as trustee was confirmed, and that thereafter, towit: on the 3rd day of September, 1936, an order was made by the undersigned in said matter approving the bond and undertaking of the said Joseph M. Loomis, as said trustee.

That no review has ever been taken from said order and decree made by the undersigned on August 8, 1936.

That thereafter, towit: on the 19th day of September, 1936, the said Martin J. Bernards and Lena Bernards, bankrupts, feeling aggrieved at said order dated August 29, 1936, confirming the appointment of Joseph M. Loomis as trustee, and feeling aggrieved at the order dated September 3, 1936, hereinabove set, approving the bonds of said trustee, filed an instrument denominated Notice of Appeal, attempting to appeal from said decision and orders dated, respectively, August 29, 1936 and September 3, 1936, which Notice of Appeal the undersigned Referee believes is insufficient to support a review of said orders by this Honorable [fol. 96] Court but which nevertheless is allowed.

I herewith transmit, for the information of the Court, the following documents and papers, upon which said order and decree of August 8, 1936, is based and founded, towit:

1. Petition filed by Martin J. Bernards and Lena Bernards directed to H. A. Kuratli, Conciliation Commissioner, and filed July 15, 1936.
2. Answer and cross petition of the petitioners, M. R. Johnson and The United States National Bank of Portland (Oregon), filed on July 24, 1936.
3. The reply of the bankrupts to the petition and answer of M. R. Johnson and The United States National Bank of Portland (Oregon), filed on August 8, 1936.
4. The order and decree of the undersigned dated August 8, 1936, and deciding the issues involved in said petition and answer and cross petition and reply hereinabove men-

tioned, and from which order no appeal or review has ever been taken.

That thereafter, to-wit: on the 29th day of August, 1936, after due notice thereof, at a meeting of the creditors of said bankrupts, said creditors unanimously elected one Joseph M. Loomis as trustee of the estate of the above named bankrupts, and that thereafter an order was made and entered on the 29th day of August, 1936, approving and confirming the election of the said Joseph M. Loomis as such trustee, and that thereafter the said Joseph M. Loomis filed his undertaking as such trustee, and on the 3rd day of September, 1936, this Court made and entered [fol. 97] an order approving said bond.

I transmit herewith, for the information of the Court, as a basis for the review, the following documents, instruments and papers, to-wit:

1. Order confirming the election of Joseph M. Loomis as trustee of the bankrupt estate of Martin J. Bernards and Lena Bernards dated August 29, 1936.

2. Qualifying bond of trustee, Joseph M. Loomis.

3. Order approving and confirming the bond of the said Joseph M. Loomis as trustee dated September 3, 1936.

4. Notice of Appeal filed by the said Martin J. Bernards and Lena Bernards on September 19, 1936, appealing from the order appointing the trustee dated August 29, 1936, and from the order approving the bond of the trustee dated September 3, 1936, and which Notice of Appeal was directed to H. A. Kuratli, Conciliator in Bankruptcy, Joseph M. Loomis, Trustee in Bankruptcy, and to Bagley & Hare, attorneys for said trustee.

5. Records of Creditors' Meeting held on August 29, 1936.

That the question for review is whether or not the unanimous election of Joseph M. Loomis as trustee by the creditors of said bankrupts and the confirmation thereof by your Referee, and the approval of the undertaking of said Referee are valid.

Wherefore, your Referee certifies said questions as aforesaid for the determination by the Court.

Respectfully submitted, H. A. Kuratli, Conciliation Commissioner in Bankruptcy.

[fol. 98] Notice of the filing of the foregoing certificate mailed on Oct. 2, 1936, to Platt, Platt & Black, E. B. Tongue, Glenn R. Jack, and George R. Bagley.

G. H. Marsh, Clerk, by L. S. Rogers, deputy

[File endorsement omitted.]

[fol. 99] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPOINTING APPRAISERS

It is Ordered that E. A. Griffith, W. C. Christensen and Carl Bechen, of Washington County, Oregon, three disinterested persons, be and they are hereby appointed appraisers to appraise the real and personal property belonging to the Estate of said Bankrupts set out in the Schedules now on file in this Court and report their appraisal to the Court, said appraisal to be made as soon as may be and the appraisers to be duly sworn.

Witness my hand on this 25th day of September, A. D. 1936.

H. A. Kuratli, Conciliation Commissioner of Washington County and Referee in Bankruptcy.

COUNTY OF WASHINGTON,

District of Oregon, ss:

Personally appeared the within named E. A. Griffith, W. C. Christensen and Carl Bechen and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

E. A. Griffith, W. C. Christensen, Carl Bechen.

[fol. 100] Subscribed and sworn to before me on this 28th day of October, A. D., 1936. H. A. Kuratli, Conciliation Commissioner of Washington County and Referee in Bankruptcy.

APPRAISEMENT

We, the undersigned, having been notified that we were appointed to examine and appraise the real and personal

property of the Bankrupt Estate of Martin J. Bernards and Lena Bernards, Bankrupts, have attended to the duties assigned to us and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

Description of Property Real Property:	Appraised Value
<p>Tracts 1 to 16, inclusive, described in Schedule "B" of the Amended Petition of the Bankrupts filed in this cause, have been lost to this Estate by reason of the foreclosure of the mortgages existing thereon at the time of the institution of this bankrupt proceeding and sale of said tracts of land under decree of foreclosure entered in the Circuit Court of the State of Oregon for Washington County; that the time for redemption thereof has expired and conveyances have been made by the Sheriff of Washington County, Oregon, to the respective purchasers of said tracts of land at the sale thereof under said decrees.</p> <p>An undivided one-eighth interest in the following described real property:</p> <p>Being that part of the donation land claim of S. J. N. Beeks No. 79 in Township One North [fol. 101] of Range Three West of Willamette Meridian, bounded and described as follows, to-wit: Beginning at the Northeast corner of said Claim No. 79, running thence West on the North line of said claim 10.63 chains to the Southeast corner of Henry Elack donation land claim; thence South $75^{\circ} 30'$ West 24.12 chains; thence South $0^{\circ} 30'$ West on East line of a tract of land owned by Theo. Bernards 44.54 chains to a post on the North line of J. Butts donation land claim; thence East on such North line 34.90 chains to a stone; thence North $0^{\circ} 40'$ West 50.86 chains to the place of beginning, containing 167.70 acres</p>	\$2,000.00
Personal Property:	
300 tons of Chopped Hay	\$1,200.00
110 tons Baled Straw	385.00
1 Black Mare	125.00

Personal Property—Continued:	Appraised Value
1 Black Gelding	150.00
1 Black Gelding	125.00
1 Holstein Cow	60.00
130 Lambs	312.50
160 Ewes	271.25
1 22-36 International Tractor	400.00
1 Big Six McCormick-Deering Mower	45.00
1 Big Six McCormick-Deering Mower	45.00
1 12-foot McCormick-Deering Rake	35.00
1 4-bottom 16-inch John Deere Tractor Plow	10.00
1 3-bottom 14-inch John Deere Tractor Plow	20.00
1 Papee 3-row Hay Cutter	100.00
1 28-foot Corrugated Roller	100.00
1 22-foot Spring Tooth Harrow	50.00
1 33-foot Six Section Peg Tooth Harrow	25.00
[fol. 102] 1 10-foot Van Brunt Drill	75.00
1 7-foot Wooden Roller	5.00
1 8-foot 22-inch Tandem Covercrop Disc	70.00
1 8-foot 22-inch Tandem Covercrop Disc	70.00
1 10-foot 16-inch Tandem Tractor Disc	20.00
1 14-inch Walking Plow	1.00
1 16-inch Walking Plow	1.00
1 16-foot Land Plaster Seeder	25.00
1 Hay Tedder	15.00
1 3-horse McCormick-Deering Cultivator, 2-row	40.00
1 2-horse Cultivator	5.00
1 2-horse Cultivator	5.00
1 1-horse Cultivator	.50
1 1-horse Cultivator	.50
1 Clipper Power Fanning Mill	20.00
1 Hand Fanning Mill	2.50
1 Set of Harness	25.00
1 Set of Harness	15.00
1 Wagon: "Steel" (written in lead pencil)	15.00
1 Wagon: "Wood" " " " "	2.00
2 Hay Racks	2.50
1 3½ Bain Wagon and Box	50.00
1 5-ton White Truck, 1925 Model	50.00
1 5-ton White Truck, 1925 Model	50.00
1 3½-ton White Truck, 1921 Model, motor missing	20.00

Personal Property—Continued:

	Appraised Value
1 3-ton Packard Truck, 1918-19 Model	50.00
1 3-ton Packard Truck, 1918-19 Model	50.00
1 1928 Buick Sedan Automobile	5.00
1 3300-gallon Gasoline Tank	35.00
[fol. 103] 1 5000-gallon Gasoline Tank	40.00
1 Water Pump with motor attached	Missing
1 "Howe" (written in lead pencil) Scales, 3 by 4 platform	5.00
20 Cords Wood in basement of house	50.00
20 40-rod spools Fencing	80.00
1 Fodder Chopper	2.00
1 New Fertilizer Spreader, purchased on conditional sales contract from John Deere Plow Co.	140.00
1 Used Fertilizer Spreader	5.00

The 85-acre crop of hairy vetch; the 50 acres of oats and Austrian peas; the 100 acres of Victory oats; the 90 acres of Barley harvested and the 2 tons of Vetch mentioned in Subdivision 6 of Schedule "B" of the amended petition of the Bankrupts, heretofore filed in this cause, do not seem to be in existence and have not been appraised.

The household goods and furniture described in Subdivision 9 of Schedule "B" has been taken by the owner thereof who had sold the same to the Bankrupts upon an installment sales contract.

The unpaid accounts listed in Subdivision 10 of Schedule "B" were not presented to us for appraisement.

Total Appraised Value

\$6,505.75

In Witness Whereof, We have hereunto set our hands at Hillsboro, Oregon, this 28th day of October, 1936.

E. A. Griffith, W. C. Christensen, Carl Bechen, Appraisers. Filed Oct. 29, 1936. H. A. Kuratli, Con. Com. Filed July 29, 1938, G. H. Marsh, Clerk, by L. S. Rogers, Deputy.

[fol. 104] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF EXEMPTION—Filed January 14, 1937

At Hillsboro in said District, on this 14th day of January, 1937, came on for hearing the report of the Trustee advising of the setting out of the personal exemptions of the bankrupts under the laws of the State of Oregon: and

It appearing that the bankrupts selected and that the said Trustee has set out the following items, namely:

1 Black Mare, appraised at	\$125.00
1 Black Gelding (small one), appraised at	125.00
1 4-bottom 16-inch John Deere Tractor plow, appraised at	10.00
1 14-inch walking plow, appraised at	1.00
1 set of harness, appraised at	25.00
1 farm wagon, home made, appraised at	2.00
1 5-ton White Truck, 1925 model, in Portland in storage, appraised at	50.00
1 5-ton White Truck, 1925 model, on the farm, appraised at	50.00
1 Fairbanks platform scale, appraised at	5.00
1 Fodder chopper, appraised at	2.00
1 Used Fertilizer Spreader, appraised at	5.00
1 Holstein Cow, appraised at	60.00
10 Sheep, to be selected from the flock, appraised at	17.00
5 Tons of Chopped Hay, to feed the horses 60 days, and the sheep and cow 90 days, appraised at	20.00
Total Set Out to the Bankrupts	<u>\$497.00</u>

as exempt under the laws of the State of Oregon:

[fol. 105] It Is Now Ordered that said selection and said allowance and setting out by the Trustee of said items of property be and hereby are approved and the said items are withdrawn from the assets of the said bankrupts, and said Trustee is authorized to deliver the same to the said bankrupts.

H. A. Kuratli, Conciliation Commissioner and Referee in Bankruptcy.

Dated this 14th day of January, 1937.

[File endorsement omitted.]

Filed July 29, 1938. G. H. Marsh, Clerk, by L. S. Rogers, Deputy.

[fol. 106] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL APPRAISEMENT—Filed January 21, 1937

We, the undersigned appraisers of the bankrupt estate of Martin J. Bernards and Lena Bernards, heretofore appointed to examine and appraise the real and personal property of said bankrupt estate and who have heretofore filed herein such an appraisement of the items of property at said time in the possession of the Trustee, do now estimate, value and appraise the following personal property not then exhibited to us and not then in the possession of the Trustee in Bankruptcy and since said former appraisement reduced to possession by said Trustee, namely:

Description of Property	Appraised at
1 Blacksmith's Anvil	\$10.00
100 Steel Fence Posts @ \$.25 each	25.00
Odds and ends of iron and steel, known as scrap-iron	1.00
1 15-30 International Tractor, located in the City of Portland, Oregon, in the possession of Ike Mullen, subject to possessory lien of said Ike Mullen in the sum of \$115.25; equity of estate	250.00
1 Sheep-Shearing Outfit, now in the possession of Lucy Duyck	20.00
1 9-foot Corrugated Roller	59.00
[fol. 107] 1 Large Roller Hitch	1.00
1 Iron Roller	60.00
1 Buck Sheep	4.25
Total Supplemental Appraisement	\$430.25

In Witness Whereof we have hereunto set our hands and seals at Hillsboro, Oregon, this 21st day of January, 1937.

William C. Christensen, Carl G. Bechen, E. A. Griffith, Appraisers.

[File endorsement omitted.]

Filed September 2, 1938. G. H. Marsh, Clerk, by L. S. Rogers, Deputy.

[fol. 108] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT—Filed May 10, 1938

There coming on to be heard before the Honorable James Aiger Fee, judge of the above entitled court:

1. The petition of said bankrupts filed herein on January 15, 1937; the answer thereto filed by Catherine H. Collins, by M. R. Johnson and the United States National Bank of Portland (Oregon) and by Joseph M. Loomis, trustee; and the bankrupts' reply to said answers.

2. The motion of said bankrupts filed herein on April 13, 1938.

And the bankrupts appearing by their attorney W. E. Richardson, Catherine H. Collins appearing by her attorney William L. Brewster, M. R. Johnson and the United States National Bank of Portland (Oregon) appearing by their attorneys Arthur D. Platt and E. B. Tongue, and Joseph M. Loomis, trustee, appearing by his attorney George R. Bagley.

And W. E. Richardson attorney for the bankrupts having admitted the allegations contained in paragraphs I and IV of said answer of Catherine H. Collins.

And said attorney for the bankrupts having further admitted the allegations contained in the answer of said M. R. [fol. 109] Johnson and the United States National Bank of Portland (Oregon) contained in paragraphs II-XI inclusive and that part of paragraph XIII from its beginning to the words, "expired June 29, 1936" on line 29 of page 8.

And said attorney for the bankrupts having further admitted the allegations contained in the following portions of the answer of Joseph M. Loomis, trustee, to-wit:

In paragraph VI beginning with the words, "that at a meeting" on line 18 of page 5 and extending to the end of the paragraph; all of paragraphs VII, VIII and IX.

And thereupon the statements and arguments of counsel having been heard, and all of the above named matters having been duly considered, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

I

That on the 19th day of December, 1934, Martin J. Bernards and Lena Bernards were, by order and judgment of this court, duly adjudicated bankrupts, and said bankrupts sought relief under the provisions of the "Frazier-Lenke" amendment, known as subdivision "S", Section 75 of the Act of Congress, known as the Bankruptcy Act.

II

That on September 30th, 1935, by order of this court duly made and entered, said cause was referred to H. A. Kuratli, Conciliation Commissioner of Washington County, that [fol. 110] thereupon said bankrupts filed a petition praying for an order of said Commissioner granting to said bankrupts immediate possession and control of all of the property, real and personal, enumerated and listed in the schedules attached to the amended debtor's petition, filed by them in this court and cause. That M. R. Johnson and United States National Bank of Portland, Oregon, appearing in said cause and answered said petition and set forth in said answer their mortgage upon the real property described in said schedules, the foreclosure thereof, all proceedings in the Circuit Court of the State of Oregon for Washington County, and the sale of said premises by the Sheriff of Washington County pursuant to decree of said State Court to the said M. R. Johnson and United States National Bank. That upon due and legal proceedings had before said Commissioner upon said petition and answer, in which the said bankrupts appeared in person and by counsel, said Commissioner, upon said issues so presented, the said Commissioner having jurisdiction so to do, on the 8th day of August, 1936, entered the order and judgment following, namely:

"It Is Therefore Ordered and Adjudged that the said bankrupts have no right, title or interest in or to any of the real property set forth in said decree except Tract No. 15.

"It Is Further Ordered and Adjudged that no legal or valid offer of composition has ever been made by the bankrupts to their creditors.

[fol. 111] "It is Further Ordered and Adjudged that said sub-section (s) of Section 75 of the Bankrupt Laws as

amended and approved on August 28, 1935, has no application to the real property described in said decree hereinabove set forth.

"It is Further Ordered and Adjudged that said bankrupts are not farmers within the meaning of said sub-section (s) of said Section 75 of the Bankrupt Laws as amended and approved on August 28, 1935.

"It is Further Ordered, Adjudged and Decreed that the above named bankrupts are not entitled to the benefits of the provisions of sub-section (s) of said section 75 of the Federal Bankrupt Law as amended and approved on August 28, 1935, and that said petition of bankrupts be and hereby is denied.

"It is Further Ordered, Adjudged and Decreed that a trustee be appointed of all the personal property of said bankrupts and that it be sold or otherwise disposed of for the purpose of liquidating the debts of said bankrupts."

That no petition for review of said order was ever filed and no review thereof has ever been had and said order and judgment of said Commissioner aforesaid has become final.

III

That during the foreclosure of the mortgage upon the land described in the schedules attached to the amended petition of the bankrupts filed December 19th, 1934, the bankrupts herein named filed in this court and cause a petition seeking an order restraining the Sheriff of Washington County from executing a writ of assistance ousting the said bankrupts from the possession of the lands described in said foreclosure proceedings and upon said application ex parte a temporary order restraining said Sheriff from the execution of said writ of assistance was made and entered in this cause. That after full hearing upon said petition in which the bankrupts appeared by Counsel, this Court, on December 18th, 1935, duly made, rendered and entered an order and judgment as follows:

"It Appearing Further to the Court That said real property was sold by said sheriff prior to the issuance of said restraining order to M. R. Johnson and The United States National Bank of Portland (Oregon) under and pursuant to an execution issued out of said Circuit Court, pursuant to a decree duly made and entered in said court, that said

sale was duly confirmed by said Circuit Court and that said Circuit Court had jurisdiction ~~over~~ said suit and the parties thereto and the subject matter thereof, which jurisdiction it acquired prior to the commencement of any of the proceedings herein, and that by reason thereof the threatened acts of the Sheriff of Washington County (Oregon) would not constitute an interference with any property of the bankrupt as defined by the Acts of Congress.

"It is Hereby Considered and Ordered that said temporary restraining order, and the whole thereof, be, and it is, hereby vacated and set aside and that the application of said bankrupts for the continuance of said restraining order be, and it is, hereby denied."

That no appeal from said judgment and order has ever been taken or prosecuted by the bankrupts, and that the time for such appeal has long since expired and said order has become final.

IV

That on the 29th day of August, 1936, pursuant to written notice given to all creditors of said bankrupts by the Conciliation Commissioner a meeting of the creditors of said bankrupts was held at Hillsboro, Oregon, on said date, [fol. 113] whereat, on said day Joseph M. Loomis, by the majority vote in number of claimants who had presented their claims against said bankrupt estate and majority in amount of claims, was, by said creditors, duly elected trustee of said bankrupt estate, and on September 3, 1936, said election aforesaid was, by order made and entered by the Commissioner, duly ratified, and by said order the bond of said trustee was fixed at the sum of \$1000.00. That thereafter said Joseph M. Loomis filed in this cause his bond as such trustee in the sum of \$1000.00 conditioned as by Law prescribed and on September 4th, 1936, the said bond, by order of said Commissioner was duly approved and said Joseph M. Loomis thereafter proceeded to administer the assets of said bankrupt estate and has continued so to do in the manner hereinafter more particularly set forth. That the bankrupts filed in said proceeding a notice of appeal and based thereon the said Conciliation Commissioner prepared and filed with the Clerk of this court a certificate of review of said orders of September 3rd and September 4th, aforesaid. That after due notice and hearing upon such

review, on December 14th, 1936, this Court duly made, rendered and entered the following order:

“Martin J. Bernards and Lena Bernards, the above-named bankrupts, having heretofore filed with H. A. Kuratli, Conciliation Commissioner for Washington County, Oregon, their petition for review in the form of an entitled “Notice of Appeal” from that certain order of said Conciliation Commissioner for Washington County, in the above entitled cause, dated August 22, 1936, and that certain order of said Conciliation Commissioner dated Sep-[fol. 114] tember 4, 1936, and said Conciliation Commissioner having transmitted said petition or notice to this court, together with his certificate thereon, and the court having considered the same and being fully advised,

“Now, Therefore, it is Considered and Ordered that the aforesaid orders of said Conciliation Commissioner be, and they are hereby affirmed, and said petition or notice be, and it is hereby, denied.”

That said bankrupts have not appealed from said order and judgment so entered, as aforesaid, and the time for appeal has long since expired and said judgment of this court has become final.

V

That on the 13th day of January, 1937, upon filing by the bankrupts of the petition now pending in this Court and to which this answer is now made, application was made to this court for an order restraining and enjoining Joseph M. Loomis, Trustee, from selling the personal property listed and enumerated in the schedules attached to the amended debtor's petition filed by the bankrupts on December 19th, and after an ex parte hearing thereon such temporary order of restraint was refused and denied by this court. That no appeal has been taken from such order denying said temporary order of restraint.

VI

That during all of the time after the election, confirmation and qualification of the Trustee in this cause and relying upon the orders and judgments of this court as authority therefor, said Trustee has proceeding with the ad-[fol. 115] ministration and disposal of the assets of said

estate in conformity with the general provisions of the Act of Congress relating to bankruptcy. That an inventory of all of the property of said bankrupts was filed and appraisal thereof was duly made by appraisers duly appointed by order of said Commissioner; that at a meeting of the creditors of said bankrupts, duly called and held, upon notice, the sale of the property of said bankrupt estate was authorized, and pursuant to such authorization and the orders of said Commissioner duly made and entered, the personal property, except such portions thereof set out to the bankrupts as exempt under the laws of the State of Oregon, claimed, designated and selected and received by the bankrupts, was sold at public auction or private sale as directed by said orders of said Commissioner and the Trustee has received from the sale thereof the sum of \$7,835.06.

VII

That the Trustee, upon order of the Commissioner, has paid out for expenses of securing possession, caring for, preparing for sale, and selling said property, and other expenses of administration in the sum of \$1512.67. That there will be further expenses of administration, the amount whereof at this time cannot be definitely stated, including compensation of Trustee and compensation of attorneys for the Trustee, in addition to the partial payment of attorneys' fees heretofore mentioned.

[fol.116]

VIII

That there has been presented and allowed as preferred claims against said bankrupt estate and entitled to payment in full, claims amounting to \$960.21.

IX

That the general claims have been presented and allowed in the sum of \$32,032.40.

X

That the real property described in the schedules attached to the amended debtors petition, filed in this cause December 19th, 1934, which was then subject to the mortgages mentioned and specified in said schedules has been sold upon foreclosure decrees and deeds therefor executed

by the Sheriff of Washington County to purchasers at the sale thereof, except the undivided one-eighth interest of the bankrupt in and to the land described in said schedules designated as the seventeenth tract, and the Trustee has not at any time had possession or control of any of the lands described in said schedules. That said undivided one-eighth interest in said tract, specified in said schedules as Tract No. 17, is subject to a mortgage in the sum of \$1500.00 and accrued interest in favor of J. M. Vanderzander, and said mortgage is a valid mortgage and said J. M. Vanderzanden has sought permission to foreclose the same. That the amount due upon said mortgage is largely in excess of the fair market value of said undivided [fol. 117] one-eighth interest of the said bankrupts, and in fact said bankrupt estate has no substantial interest in said land that would justify the Trustee in incurring expense in the sale thereof.

XI

That the said bankrupts have made no attempt to comply with the conditions required of them by the "Frazier-Lemke" amendment to the Acts of Congress in relation to bankruptcy, necessary to be complied with by them in order to obtain the right and privilege of a three years' stay of enforcement of the obligations owned and held by their creditors and possession of the real and personal property described in the schedules attached to their debtor's petition on file in this cause on a rental basis, as provided in subdivision (s) of Section 75 of the Bankruptcy Act.

XII

That the said Martin J. Bernards and Lena Bernards, Bankrupts, have never at any time submitted any proposal for a composition and extension which was an equitable and feasible plan for the liquidation of the claims of their secured creditors or other creditors which would result in the financial rehabilitation of the said bankrupts.

XIII

That the said Martin J. Bernards and Lena Bernards at the time of the filing of the debtor's petition, on December 19th, 1934, and at all times thereafter, have been in

[fol. 118] truth and in fact beyond all hope of financial rehabilitation and the only effect of further proceedings and delays on their behalf in this bankruptcy proceeding will be to postpone the inevitable liquidation of their financial affairs without benefit to them and resulting in great hardship to the creditors, preferred and common, of the said bankrupts.

XIV

On account of the findings aforesaid, and by reason of other matters appearing in the record and files in this cause and which, by reference, are made a part of this answer, the bankrupts have shown and established that there has at no time since the inception of these bankruptcy proceedings, been any possibility of financial rehabilitation of the bankrupts; that they have been barred and precluded from the relief conditionally granted by sub-division (s) of Section 75 of the Bankruptcy Act.

XV

On or about April 4, 1930, said bankrupts, being then indebted to the aforesaid M. R. Johnson in the sum of \$70,000.00, made, executed and delivered to him their promissory note for said sum of \$70,000.00 due on or before four months after date, with 8% interest from date until paid, and contemporaneously therewith and to secure the payment thereof made, executed and delivered to said M. R. Johnson their certain mortgage, wherein and whereby they mortgaged to said M. R. Johnson all that certain real property in Washington County, Oregon, described in the inventory and schedules of said bankrupts herein as Parcels 1 to 15, inclusive, and described as follows: (specific descriptions omitted). Parcel 15 of said lands was, at the date of said mortgage, subject to a prior mortgage held by one Catherine H. Collins, and a portion of Parcels 1 to 15, inclusive, described in the schedules herein as Parcel 16 thereof was subsequently, and on or about February 24, 1931, released by said M. R. Johnson from the aforesaid mortgage, and mortgaged by said bankrupts to the World War Veterans' State Aid Commission of Oregon, and a new mortgage covering said Parcel 16 but junior to said last mentioned mortgage was thereafter made, executed and delivered by said bankrupts to said M. R. Johnson.

XVI

Part of the money loaned by said M. R. Johnson to said bankrupts as aforesaid was borrowed by said M. R. Johnson from The United States National Bank of Portland (Oregon), and both of the aforesaid mortgages given by the bankrupts to said M. R. Johnson, and also the hereinafter mentioned bonds, were by said M. R. Johnson assigned to said bank in order to secure the aforesaid loan from said bank to said M. R. Johnson. Part of the money so loaned by said M. R. Johnson to said bankrupts was used by said [fol. 120] bankrupts to purchase certain waterworks extension bonds of the City of Orenco of the Tualatin Valley, a municipal corporation of the State of Oregon, numbered 6, 7, 8, 9, 10, 11, and 41, of the par value of \$1,000.00 each, except that \$400.00 had been paid on account of said bond #6, all with interest coupons numbered 18 to 30, inclusive, attached, the entire purchase price of said bonds being paid for out of said loan, and said bankrupts thereupon pledged said bonds with said M. R. Johnson as additional security for said loan.

XVII

Thereafter said mortgages to said M. R. Johnson and the pledge of said bonds became in default and, on the 6th day of April, 1934, said M. R. Johnson and The United States National Bank of Portland (Oregon) filed a suit in the Circuit Court of the State of Oregon, for Washington County, to foreclose said two mortgages and said pledge, and thereafter and on July 11, 1934, after trial of said suit, said Circuit Court made and entered a decree foreclosing said mortgages and said pledge and directing the property included therein to be sold as provided by law.

XVIII

Pursuant to said decree and to an execution issued thereon, the aforesaid real property was, on June 29, 1935, sold to said M. R. Johnson and The United States National Bank of Portland (Oregon) for the sum of \$65,000.00 and [fol. 121] the aforesaid bonds were sold to said purchasers for \$2,541.40. Objections were filed to the confirmation of sale by said bankrupts but, after hearing said objections, said Circuit Court confirmed and approved said sale, and

said M. R. Johnson and The United States National Bank of Portland (Oregon) have ever since been entitled to the exclusive possession of all said real property, subject only to the rights of the aforesaid Catherine H. Collins in and to said Parcel 15.

XIX

Thereafter, and more than a year after the aforesaid sheriff's sale, said sheriff issued his sheriff's deed of said real property to said M. R. Johnson and The United States National Bank of Portland (Oregon), and said deed was duly recorded as provided by law.

XX

Martin J. Bernards, one of the above-named bankrupts, has from time to time interfered with the use of said real property by said M. R. Johnson by threats of legal action and bodily harm against persons dealing with and employed by said M. R. Johnson, and the continued pendency of this litigation has rendered it difficult or impossible for said M. R. Johnson to make a sale of any of said real property.

XXI

On October 31, 1929, said bankrupts, Martin J. Bernards and Lena Bernards, his wife, executed to Catherine H. [fol. 122] Collins a promissory note and a mortgage to secure the same on the real property situated in Washington County, Oregon, known in these bankruptcy proceedings as Parcel 15 and more particularly described in Finding of Fact XV.

On April 12, 1933, on account of defaults in the payment of said mortgage, said Catherine H. Collins commenced a suit to foreclose the same against said bankrupts and others. On July 9, 1935 a decree of foreclosure was made and entered, and on August 26, 1935, a sale of said real property in said foreclosure suit was made to Catherine H. Collins for the sum of \$10,669.35, and thereupon said Catherine H. Collins went into and has continued to be in possession of said land. On September 16, 1935, said sale was confirmed, and on September 10, 1936, a sheriff's deed on said foreclosure sale was executed to Catherine H. Collins and was thereafter duly recorded.

Recently and since she has obtained the sheriff's deed above mentioned, said Catherine H. Collins has attempted

to sell said land and had a buyer ready, able and willing to purchase for the sum of \$6400.00 subject to the payment of broker's commission and the unpaid taxes from 1931 to 1934 inclusive, but said sale fell through because of this proceeding in bankruptcy.

XXII

By reason of the foregoing findings and of other matters appearing in the records and files in the above entitled matter and which by reference are made a part of these [fol. 123] findings, the said Catherine H. Collins was from the date of sale on the foreclosure of said mortgage, August 26, 1935, a secured creditor of said bankrupts, and thereafter and since August 26, 1935, she has been and now is the sole and exclusive owner of the land described in said mortgage subject only to the statutory right of redemption which expired on August 26, 1936, but the title to said land in Catherine H. Collins is clouded by bankrupts' said petition filed January 15, 1937, and by their threats to interpose other proceedings as long as their bankruptcy is pending.

(Then follow Conclusions of Law which are repeated in Decree.)

Dated this 10th day of May, 1938.

James Alger Fee, District Judge.

[File endorsement omitted.]

[fol. 124] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER NUNC PRO TUNC—Filed Aug. 31, 1938 as of Feb. 18, 1935

This cause having come on to be heard upon the application of M. R. Johnson and The United States National Bank of Portland (Oregon), by A. D. Platt of their attorneys of record, for the entry of an order nunc pro tunc as of February 18, 1935, and

It Appearing to the Court from the affidavit of said A. D. Platt, attached to said application, and from the notes of the clerk of this court made at the time, and it being also

within the recollection and knowledge of the judge of this court, that an order was duly made on February 18, 1935 vacating a restraining order made and entered herein on August 10, 1934 and denying the petition theretofore filed by said M. R. Johnson and The United States National Bank of Portland (Oregon) except as to the vacation of said restraining order, and

It Further Appearing to the Court that said order was erroneously omitted from the record herein,

Now, Therefore, It Is Ordered that said order be entered of record as of February 18, 1935, now for then, as follows:

This cause heretofore came on for hearing upon the petition of M. R. Johnson and The United States National Bank of Portland (Oregon), praying for an order of this court [fol. 125] authorizing and permitting the petitioners and the Sheriff of Washington County, Oregon, to proceed with the execution sale pursuant to a foreclosure decree rendered in said court in the usual course, as provided by the laws and practice of the State of Oregon, without further stay of such proceedings by or under the authority of this court, and for such other and further relief as may appear to be equitable and just; and the court heard the arguments of counsel and considered their briefs and is now fully advised in the premises, and

It Appearing to the Court that this is a proceeding under Section 75 of the Bankruptcy Act, subdivisions (a) to (r) inclusive, and that said section is self-executing and provides a stay of execution in the state courts, and that the restraining order heretofore made and entered in this cause is superfluous.

Be It Therefore Ordered:

1. That said petition, in so far only as it seeks to vacate the restraining order heretofore made and entered in this cause, be and the same is hereby allowed;

2. That said petition, in so far as it seeks relief herein other than the vacation of said restraining order, be and the same is hereby in all things denied.

Dated at Portland, Oregon, this 31st day of August, 1935.

James Alger Fee, Judge of the above entitled court.

[File endorsement omitted.]

[fol. 126] IN UNITED STATES DISTRICT COURT

[Title omitted]

COUNTERPRAECIPE OF APPELLEES—Filed Sept. 2, 1938

To the clerk of the above entitled court :

You are hereby requested, pursuant to the provisions of equity rule 75 and of the rules of practice of the United States Circuit Court of Appeals for the Ninth Circuit, to incorporate into the transcript of record on the appeal herein, in addition to the portions of the record indicated by appellants herein by their praecipe to be included in the transcript of record herein, the following :

- (1) order of the court dated December 18, 1935, dissolving restraining order entered October 3, 1935;
- (2) order of conciliation commissioner, dated August 8, 1936, omitting paragraphs I to XXI;
- (3) order of conciliation commissioner dated August 29, 1936;
- (4) order of conciliation commissioner dated September 3, 1936;
- (5) certificate of conciliation commissioner on review, dated October 1, 1936;
- (6) appraisalment dated October 29, 1936;
- (7) order of exemption dated January 14, 1937;
- (8) supplemental appraisalment dated January 21, 1937;
- (9) findings of fact and conclusions of law, dated on or about May 10, 1938;
- (10) order entered on or about August 31, 1938 nunc pro tunc as of February 18, 1935.

Dated at Portland, Oregon, this 1st day of September, 1938.

George R. Bagley, Wm. L. Brewster, E. B. Tongue
and Platt & Black, Attorneys for Appellees.

[fol. 127] RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA,
District of Oregon, ss :

I hereby certify and return that I served the annexed Counterpraecipe of Appellees on the therein-named Mar-

tin J. Bernards, at his residence 1 mile Southwest of Beaverton, Oregon, at 7.25 P. M. by handing to and leaving a true and correct copy thereof with Martin J. Bernards personally at 1 Mile S. W. Beaverton, Ore in said District on the 1st day of Sept., A. D. 1938.

J. T. Summerville, U. S. Marshal, by Martin Lavelle,
Deputy.

[fol. 128] RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA,
District of Oregon, ss:

I hereby certify and return that I served the annexed Counterpraecipe of Appellees on the therein-named Lena Bernards, at her residence 1 Mile Southwest of Beaverton, Oregon at 7.25 P. M. by handing to and leaving a true and correct copy thereof with Lena Bernards personally at 1 Mile S. W. of Beaverton, Oregon, in said District on the 1st day of Sept., A. D. 1938.

J. T. Summerville, U. S. Marshal, by Martin Lavelle,
Deputy.

[fol. 129] Clerk's Certificate to foregoing transcript
omitted in printing.

[fol. 130] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION—Filed January 15, 1937

To the Honorable James Alger Fee, Judge of Said Court:

Your petitioners, Martin J. Bernards and Lena Bernards, the above named bankrupts, respectfully represent:

I

The petitioners hereby refer to all the records and files in said matter and by such reference hereby make the same a part of this petition, but for the convenience of the court and of the parties interested in said matter the petitioners

herein summarize and set forth the salient features of said records and files.

II

On the 10th day of August, 1934, the petitioners filed a petition in bankruptcy under Section 75 of the Bankruptcy Act as amended, claiming to be farmers and to be entitled to the benefits of the Act as such. At the same time the bankrupts filed their schedules in bankruptcy showing ownership and possession by them of a large amount of real and personal property. On the same date the petitioners prayed for an order restraining J. W. Connell, sheriff of [fol. 131] Washington County, Oregon, from proceeding with the sale of the real property described in the schedules under a decree theretofore entered in the Circuit Court of the State of Oregon for the County of Washington, and on that date a restraining order was issued accordingly by this court.

On the same date the matter of a composition and extension under the Act was referred to A. W. Hoffman as conciliation commissioner. In accordance with the proposal of the bankrupts for a composition and extension a hearing was had before said commissioner on the 10th day of September, 1934, regarding which the following is found in the report of said commissioner filed in the office of the clerk of this court on September 13, 1934². Referring to the date of the meeting of the creditors to consider said proposal it is said:

"at which time the debtor appeared and filed his application, but did not have the written consent of the majority in number and the majority in amount of his creditors. In fact, none of the creditors filed a written consent to the debtors' composition and extension proposal."

On October 27, 1934, the petitioners filed a petition praying that the matter of their proposal be again referred to commissioner Hoffman and this petition was granted on October 29, 1934, by this court. On December 15, 1934, the commissioner reported that a meeting had been held on December 4, 1934, and the debtors examined and that the majority creditor, Mr. Johnson, verbally rejected the proposal. The commissioner reported that his duties had been completed.

On December 19, 1934, an amended petition was filed by [fol. 132] the petitioners and on the same date they were adjudged bankrupt and the matter was referred to Willard L. Marks as commissioner.

III

On September 30, 1935, the proceedings were transferred to H. A. Kuratli as commissioner.

On October 3, 1935, a petition was filed by the bankrupts for an order restraining J. W. Connell, as sheriff, from dispossessing the bankrupts of their real property, which petition was granted on the same day and an order was issued accordingly until the further order of the court requiring the said sheriff to show cause on October 10, 1935, why the order should not be made permanent.

On October 11, 1935, an answer was filed by the sheriff setting forth the foreclosure proceedings in the Circuit Court in Washington County.

On October 15, 1935, an order was made by commissioner Kuratli (hereinafter referred to as the commissioner) requiring the bankrupts to appear before him on October 21, 1935.

On November 1, 1935, a petition was filed by the United States National Bank reciting the proceedings in the Washington County Court.

IV

On October 1, 1936, the commissioner submitted a report to this court, which included a petition of the bankrupts filed July 15, 1936, in the office of the commissioner praying for an order granting them immediate possession and control of their property under sub-division (s) of Section 75 [fol. 133] of the Bankruptcy Act, restraining the sheriff and M. R. Johnson and the United States National Bank and Catherine Collins from transferring the real property scheduled by the bankrupts, specific reference being made to the Frazer-Lemke Act. This report also included the petition of M. R. Johnson and the United States National Bank setting up the foreclosure proceedings in the Washington County Court, the order dissolving the restraining order entered against the sheriff. The commissioner finds that the bankrupts are not farmers, refers to the adjudication in bankruptcy of December 19, 1934, a pleading by the bankrupts alleging that they have an equity in the real

property in question of about \$80,000.00 and asking for the dismissal of the answer and petition of Johnson and the bank.

V

There is included in this report a decree by the commissioner dated August 8, 1936, in which there are recitals regarding a mortgage given by the bankrupts to M. R. Johnson covering the real property in question and securing a note for \$70,000.00 and the foreclosure proceedings of this mortgage commenced in the Washington County Court on April 6, 1934. It is stated that a decree foreclosing this mortgage and ordering the property sold was entered July 11, 1934, that on May 29, 1935, an execution was issued and on June 29, 1935, the property was sold to M. R. Johnson and the United States National Bank for \$65,075.00, which sale was on July 20, 1935, confirmed and on January 25, 1936, a writ of assistance was issued and on the same date the bankrupts were dispossessed by the sheriff; that at the time [fol. 134] of the sale the sheriff delivered a certificate to Johnson and the bank and on July 1, 1936, no redemption having been made, he delivered a deed to them. It is stated that Johnson and the bank are now the owners of the property and have been in possession thereof since June 29, 1935, except of tract No. 15 containing approximately 80 acres. As to this tract recitals are made concerning a mortgage to Catherine Collins, the foreclosure thereof and the sale of the same on August 26, 1935, to Catherine Collins for \$10,689.35.

VI

The commissioner further refers to the adjudication in bankruptcy and the offer of composition, that they failed to secure the consent of their creditors to their proposal, that they filed an amended petition on December 19, 1934, and on June 28, 1935, again applied to the court for an order referring their proposal for the third time to commissioner Hoffman, which application was denied.

VII

It is stated in this report that the bankrupts have never made application under sub-section (s) of Section 75, praying that their property be set apart to them, that the commissioner has never appointed appraisers under that section; that he has never issued any order to the effect that the

bankrupts should have possession of their property under the supervision of the court and has never made any order staying any judicial proceedings for a period of three years or any other time and that he has never fixed a reasonable rental to be paid by the bankrupts or entered any [fol. 135] order permitting the bankrupts to retain possession of their property, or any part thereof, in the custody or under the control of the court and that no proceedings have ever been instituted or any orders made under subdivision (s) of Section 75 of the Act except the order recalling the proceedings from Willard Marks and referring them to H. A. Kuratli. It is further recited that the bankrupts have no interest in the real property in question except one parcel containing 167.70 acres designated in the schedules of the bankrupts as parcel No. 17 and that title to this parcel is held by eight heirs of — Bernards in common; that the bankrupts have not used or occupied said farm since the year 1930 and since that time this tract No. 17 has been rented to one Lepschat, a brother-in-law of Martin J. Bernards and that this tract is subject to a mortgage to one F. J. Vanderzanden for \$1500.00 executed December 3, 1932, upon Martin J. Bernards undivided 1/8th interest.

VIII

At a hearing had before the commissioner on January 11, 1937, wherein Joseph Loomis, the alleged trustee appointed by said commissioner was present and represented by Honorable George R. Bagley as his counsel, and the bankrupt Martin J. Bernards was present and represented by B. G. Skulason as his counsel, the commissioner was asked by said counsel for the bankrupts whether or not the said commissioner in the proceedings had before him had proceeded under the Frazer-Lemke Act of August 28, 1935, [fol. 136] and the said commissioner replied that from the time the matter was referred to him he had proceeded under such Act. He was then asked by the same counsel whether or not the commissioner had appointed appraisers under said Act and, if so, whether an appraisal of the property of the bankrupts had been made, and the commissioner replied that such appraisers had been appointed and such appraisal had been made and produced from the files a document of that tenor and effect. The counsel now

representing your petitioners has not had time to examine the records in the office of said commissioner except as above stated.

IX

It is further recited in this report and set forth in said decree of August 8, 1936, that the bankrupts are not farmers as defined by said Act and that on August 28, 1935, they had only an equity of redemption in the lands described in the decree except said tract No. 15 and that the Act of August 28, 1935, is unconstitutional. It is adjudged by said decree that the commissioner has not now, nor since June 29, 1935, had any jurisdiction of the real property described in the decree; that the bankrupts have no title thereto except to tract No. 15, that no legal or valid offer of composition has ever been made by the bankrupts to their creditors; that sub-section (s) of Section 75 of the [fol. 137] Act approved August 28, 1935, has no application to the real property described in the decree, that the bankrupts are not farmers within the meaning of the law, that they are not entitled to the benefits of that section and that their petition for setting aside to them the property under the control of the court is denied. Finally it is adjudged that a trustee be appointed of all the personal property of the bankrupts and that said property be sold, or otherwise disposed of for the purpose of liquidating the debts of the bankrupts.

On August 29, 1936, an order was entered by the commissioner appointing Joseph Loomis trustee accordingly.

X

On September 19, 1936, the bankrupts filed a document designated as a notice of appeal from the order of August 29, and another order of September 3, 1936, both relating to the appointment of the trustee.

XI

There is on file a record of a meeting of the creditors on August 29, 1936, and a petition of the bankrupts filed November 30, 1936, in this court praying for an order setting aside to the bankrupts their exemptions and property as provided by the present Bankruptcy Act and this is supported by an affidavit by the petitioner Martin J. Bernards

to the effect that he made an application to the commissioner [fol. 138] for such an order and this was denied.

XII

On December 14, 1936, an order was entered by this court denying the appeal from the orders of August 29th and September 4, 1936, the language of the order being in part as follows:

“that the aforesaid orders of said conciliation commissioner be and they are hereby affirmed, and said petition or notice be, and it is hereby denied.”

Your petitioners further represent that at all times herein mentioned they were, and they still are, farmers as defined by said Bankruptcy Act and that all the proceedings taken by them in said matter from the beginning were taken in good faith with the intention and for the purpose of securing relief under the said Bankruptcy Act: that they have in all respects complied with said Act and that any and all recitals and decisions of the commissioner to the contrary are erroneous, unlawful and void and the same are hereby excepted to by your petitioners; that they were represented at the time of the filing of the petition and the amended petition by Honorable John P. Kavanaugh as their attorney and that he represented them until after the first Frazer-Lemke Act was declared unconstitutional, about which time Judge Kavanaugh became ill and was unable to represent them further. Thereupon the petitioners employed other [fol. 139] counsel who represented them until on or about the — day of —, 1936, when the said counsel withdrew from the case. Thereupon the petitioners attempted to secure the services of other counsel to represent them at the hearing of the appeal from said orders of August 29th and September 4, 1936, and understood and believed that such counsel had undertaken to represent them at such hearing. But through some misunderstanding and by reason of some inadvertence said counsel did not appear for the petitioners at such hearing. Neither did the petitioners appear at the hearing, believing that their presence was of no consequence and that their rights would be protected by said counsel. The petitioners engaged their present attorney, B. G. Skulason, only a few days ago and he has had very little time to acquaint himself with the record and the law of the case.

Your petitioners have been seriously handicapped ever since the withdrawal of Judge Kavanaugh from the case by their lack of money or means wherewith to compensate counsel and they have in fact not been able to pay their counsel anything for their services and are not now able to do so, all of their property having been taken away from them in the proceedings above recited, including their household furniture, and they having been left destitute with six young children to support. In taking the appeal from the said orders of August 29th and September 4, 1936, [fol. 140] it was the intention of the petitioners to seek a review of all the proceedings had before such commissioner, including the decree of August 8, 1936, and your petitioners were informed and understood and believed that the appeal so taken would bring before this court for review each and all of the orders and decrees of said commissioner and the failure to include said decree of August 8, 1936, in such appeal was caused by said misunderstanding by the petitioners of their rights and by some inadvertence on the part of counsel who then represented them.

As matters now stand, unless relief is afforded to your petitioners by this court their attempts to take advantage, as farmers, of said Act and save a portion at least of their property will have been entirely unavailing and the result will be instead of affording them relief within the spirit of this legislation, that they will lose their entire holdings which are extensive and valuable and will continue to be destitute as they are at present in view of the seizure of their property as above set forth.

XIV

An order has heretofore been entered by said commissioner authorizing the said alleged trustee to sell the personal property of your petitioners on the 14th day of January, 1937, at the hour of 10:00 o'clock A. M. On the 4th day of January, 1937, your petitioners filed with the commissioner a petition praying for relief under said sub-section (s) of Section 75, for the possession of all of their property and for an order revoking the order of the commissioner of August 8, 1936, for the removal of said alleged trustee and for an order restraining and enjoining him from proceeding with said sale, and for other relief, which petition came on for hearing before said commissioner on January 11, 1937, the petitioners being repre-

sented by B. G. Skulason as their attorney and the said alleged trustee appearing by Honorable George R. Bagley as his attorney. Thereupon a motion was filed by said alleged trustee for a dismissal of said petition upon the ground that all matters mentioned in said petition had been heretofore adjudicated adversely to the petitioners, and said motion was granted and an order entered accordingly on the last mentioned date. It is the intention of your petitioners to request a review of the last mentioned decision in due time under the rules of this court. But unless an order is entered immediately upon the filing of this petition restraining the said alleged trustee from proceeding with said sale he will proceed with the same in total disregard of the rights of your petitioners and to their irreparable damage.

XV

Your petitioners, therefore, pray that their failure to seek a review of the said decisions of the commissioner [fol. 142] within the time limited by the rules of this court be excused by reason of the mistakes and inadvertence above mentioned; that this court review the entire record and adjudge that these proceedings are governed by the Act of August 28, 1935, and have been so governed from the date when said Act went into effect, particularly in view of sub-division (5) of Section 6 of said Act amending said Section 75; that the aforesaid decisions of the commissioner, each and all of which are contrary to law and void and hereby excepted to, be reversed and your petitioners held to be farmers entitled to all the benefits of said Act, including their exemptions and right to possession of their property under the control of the court and that the commissioner be ordered to proceed accordingly; that this petition be considered by the court as exceptions to said decisions of the commissioner and to his said report with the same force and effect as if your petitioners had complied with the rules of the court relative to petitions for review or appeal from such decisions; that this court grant to the petitioners such other and further relief as they may be entitled to in the premises to the end that their rights and interests may be fully protected under said Bankruptcy Act and all their property, both real and personal, restored to them and conserved for them as contemplated by said [fol. 143] Act.

Your petitioners further pray that a date be fixed for a hearing on this petition which your petitioners are serving on the attorneys for said M. R. Johnson, the said United States National Bank and the said alleged trustee, and Catherine Collins, and that in the meantime the said trustee be restrained from taking any further proceedings to sell the personal property of your petitioners or from doing anything else in relation to their property or their property rights.

Respectfully submitted, Martin Bernards, Lena Bernards, Petitioners. B. G. Skulason, Skulason & Skulason, Attorney for Petitioners.

Duly sworn to by Martin J. Bernards. Jurat omitted in printing.

[fol. 144] STATE OF OREGON,
County of Multnomah, ss:

I, B. G. Skulason, being first duly sworn, depose and say that I am one of the attorneys for the within named petitioning bankrupts; that on the 14th day of January, 1937, I served the within petition on Mr. E. B. Tongue, attorney for M. R. Johnson, the principal creditor of said bankrupts, and on Honorable George R. Bagley, the attorney for Joseph Loomis, the trustee in said matter, by depositing in each instance in the United States Post-office at Portland, Oregon, a true copy of said petition duly certified to by me as such attorney for the petitioners, such copy being in each instance enclosed in a sealed envelope, postage prepaid, and addressed to said Mr. E. B. Tongue and said Honorable George R. Bagley, respectively, at Hillsboro, Oregon, which was and is the place of residence of said attorneys and that the said attorneys are the persons intended to be served with said petition. I further depose and say that between the City of Portland, and the City of Hillsboro, Oregon, there is communication by mail.

B. G. Skulason.

Subscribed and sworn to before me this 14th day of January, 1937. Rolfe W. Skulason, Notary Public for Oregon. My commission expires Feb. 25, 1939.

[fol. 145] STATE OF OREGON,
County of Multnomah, ss:

I, C. W. Powers, being first duly sworn, depose and say that I am over the age of 21 years, a citizen of the United States and a resident of the City of Portland, said state; that on the 14th day of January, 1937, at the hour of 11:30 A. M. I personally served the foregoing Petition on Arthur D. Platt, attorney for the United States National Bank of Portland, Oregon, at his office in the Platt Building in said City, by then and there delivering to and leaving with him a certified copy of said Petition.

C. W. Powers.

Subscribed and sworn to before me this 14th day of January, 1937. Rolfe W. Skulason, Notary Public for Oregon. My commission expires February 25, 1939.

[File endorsement omitted.]

[fol. 146] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF CATHERINE H. COLLINS TO BANKRUPTS' PETITION
FILED JAN. 15, 1937—Filed June 15, 1937

To the Honorable James Alger Fee, Judge of the Above
Entitled Court:

Catherine H. Collins for her answer to the petition of the bankrupts filed herein on January 15, 1937, represents and shows:

I

On October 31, 1929 said bankrupts, Martin J. Bernards and Lena Bernards, his wife, executed to Catherine H. Collins a promissory note and a mortgage to secure the same on the following described property situated in Washington County, Oregon:

Beginning at a stone at the southwest corner of the Caleb Wilkins and wife DLC No. 49 T 1 N R 2 W of Willamette Meridian, in Washington County, Oregon; and running

thence N 1 degree 00' W on West boundary of claim 29.15 chs. (1023.9) ft. to a pipe 2" dia., thence S 79 degrees 51' E 27.97 $\frac{1}{4}$ chs. (1842.6 ft.) to a pipe 2" dia., thence S 1 degree 00' E 29.15 chs. to a pipe corner on south boundary of said DLC set by J. C. Hall, in 1893, thence N 79 degrees 51' W. 29.97 $\frac{1}{4}$ chs. to the place of beginning, containing 80 acres of land.

On April 12, 1933 on account of defaults in the payment [fol. 147] of said mortgage, said Catherine H. Collins commenced a suit to foreclose the same against said bankrupts and others. On July 9, 1935 a decree of foreclosure was made and entered, and on August 26, 1935, a sale of said real property in said foreclosure suit was made to Catherine H. Collins for the sum of \$10,689.35, and thereupon said Catherine H. Collins went into and has continued to be in possession of said land. On September 16, 1935 said sale was confirmed, and on September 10, 1936 a sheriff's deed on said foreclosure sale was executed to Catherine H. Collins and was thereafter duly recorded.

Catherine H. Collins has paid the following State and County taxes on said land:

Mar. 14, 1936—1936 in full	\$211.20
Dec. 12, 1936—1935 in full	228.89
" " " —1931 1st $\frac{1}{4}$	60.48
Mar. 15, 1937—1937 1st $\frac{1}{4}$	52.85
	<hr/>
	\$553.42

The following State and County taxes are unpaid:

1931 $\frac{3}{4}$	181.44
1932 all	272.81
1933/4 all	234.99
1937 $\frac{3}{4}$	158.54
	<hr/>
	\$847.78

Recently and since she has obtained the sheriff's deed above mentioned, said Catherine H. Collins has attempted to sell said land and had a buyer ready, able and willing to purchase for the sum of \$6400.00 subject to the payment of broker's commission and the unpaid taxes from 1931 to 1934 inclusive, but said sale fell through because of this pro-[fol. 148] ceeding in bankruptcy.

Mr. M. R. Johnson and the United States National Bank of Portland, Oregon are in a position like that of Catherine H. Collins, and together with her are the owners of all the real property included within this bankruptcy proceeding.

II

At the present time, the net results of this bankruptcy case as to the property of the bankrupts are that their exemptions have been set aside to them of articles with an appraised value of \$497.00; all their other personal property has been sold and the proceeds thereof in the sum of something over \$6,000.00 is in the hands of the trustee for distribution to creditors, but as Catherine H. Collins is informed and believes and therefore alleges, said trustee is unwilling to make said distribution until he is cleared of liability, particularly on account of said bankrupts' petition filed herein on January 15, 1937.

III

The bankrupts are not entitled to further consideration or to any relief other than their discharge in bankruptcy for the following reasons:

(a) All matters contained in and prayed for in bankrupts' petition filed January 15, 1937, have been adjudicated and determined adversely to the bankrupts, and no appeal therefrom within the time allowed by law has been taken [fol. 149] by said bankrupts.

(b) The only proposals for composition and extension by bankrupts were made on September 5 and December 4, 1934, in which proposals, it was stated that the funds with which to make said composition would be obtained through a loan to the bankrupts from Federal Land Bank, and when said proposals were made Federal Land Bank had refused to make such a loan, and the refusal was known to the bankrupts. Said proposals were not accepted by the creditors, and the Conciliation Commissioner reported to this court that the second proposal had been rejected by M. R. Johnson, the majority creditor, that the Conciliation Commissioner had set December 14, 1934 as the date for filing an application for the confirmation for said extension proposal; no application for confirmation was made or filed, and the Conciliation Commissioner in his report to this

court submitted that his duties had been completed. The bankrupts have neither applied for nor obtained an order of this court on their proposal, the rejection thereof or on the Conciliation Commissioner's report.

(c) The bankrupts have made no attempt to comply with the conditions required of them in order that they might obtain the rights and privileges of a three years' stay of the bankruptcy proceedings and possession of the real property on a rental basis as provided in Sec. 75 (S) of the Bankruptcy Act.

[fol. 150] (d) The bankrupts have not submitted any proposal for a composition and extension which was an equitable and feasible plan for the liquidation of the claims of their secured creditors or which would result in the financial rehabilitation of the bankrupts.

(e) The bankrupts are in truth and in fact beyond all hope of financial rehabilitation and the only effect of further proceedings and delays on their behalf in this bankruptcy proceeding will be to postpone the inevitable liquidation of their financial affairs without benefit to them and with great hardship to Catherine H. Collins and to all others similarly situated.

IV

By reason of the foregoing allegations and of other matters appearing in the records and files in the above entitled matter and which by reference are made a part of this answer, the said Catherine H. Collins was from the date of her mortgage, October 31, 1929, and until the date of sale on the foreclosure of said mortgage, August 26, 1935, a secured creditor of said bankrupts, and thereafter and since August 26, 1935, she has been and now is the sole and exclusive owner of the land described in said mortgage subject only to the statutory right of redemption which expired on August 26, 1936 but the title to said land in Catherine H. Collins is clouded by bankrupts' said petition filed January 15, 1937, and by their threats to interpose other proceedings [fol. 151] as long as their bankruptcy is pending.

Wherefore, Catherine H. Collins Prays for an order and decree as follows:

1. That the bankrupts' petition filed January 15, 1937 be dismissed.

2. That the title of the above described land be decreed to be in Catherine H. Collins free and clear of all right, title and interest of Martin J. Bernards and Lena Bernards under this bankruptcy proceeding.

3. That the trustee be ordered to distribute the cash on hand and that the trustee and Conciliation Commissioner take such other proceeding as will speedily complete and close this bankruptcy proceeding.

4. For such other and further relief as to this court may seem proper.

Catherine H. Collins. W. L. Brewster, Attorney for
Catherine H. Collins.

Duly sworn to by Catherine H. Collins. Jurat omitted in printing.

[fol. 152] STATE OF OREGON,
County of Multnomah, ss :

I hereby certify that I served the foregoing Answer upon Martin J. Bernards and Lena Bernards by mailing them a duly certified copy of said answer, addressed to them at Aloha, Oregon on June 14, 1937.

W. L. Brewster, Attorney for Catherine H. Collins.

[File endorsement omitted.]

[fol. 153] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF JOSEPH M. LOOMIS, TRUSTEE, TO PETITION OF
BANKRUPTS FILED JANUARY 13TH, 1937—Filed July 7, 1937

Comes now Joseph M. Loomis, Trustee, and for answer to the petition of Martin J. Bernards and Lena Bernards, filed in this court and cause on the 13th day of January, 1937, alleges :

I

That on the 19th day of December, 1934, Martin J. Bernards and Lena Bernards were, by order and judgment of this court, duly adjudicated bankrupts, and said bankrupts sought relief under the provisions of the "Frazer-Lemke" amendment, known as subdivision "S", Section 75 of the Act of Congress, known as the Bankruptcy Act.

II

That on September 30th, 1935, by order of this court duly made and entered, said cause was referred to H. A. Kuratli, Conciliation Commissioner of Washington County. That thereupon said bankrupts filed a petition praying for an order of said Commissioner granting to said bankrupts immediate possession and control of all of the property, real and personal, enumerated and listed in the scheduled [fol. 154] ules attached to the amended debtor's petition, filed by them in this court and cause. That M. R. Johnson and United States National Bank of Portland, Oregon, appeared in said cause and answered said petition and set forth in said answer their mortgage upon the real property described in said schedules, the foreclosure thereof, all proceedings in the Circuit Court of the State of Oregon for Washington County, and the sale of said premises by the Sheriff of Washington County pursuant to decree of said State Court to the said M. R. Johnson and United States National Bank. That upon due and legal proceedings had before said Commissioner upon said petition and answer, in which the said bankrupts appeared in person and by counsel, said Commissioner, upon said issues so presented, the said Commissioner having jurisdiction so to do, on the 8th day of August, 1936, entered the order and judgment following, namely:

"It is therefore Ordered and Adjudged that the said bankrupts have no right, title or interest in or to any of the real property set forth in said decree except Tract No. 15.

"It is further Ordered and Adjudged that no legal or valid offer of composition has ever been made by the bankrupts to their creditors.

"It is further Ordered and Adjudged that said subsection (s) of Section 75 of the Bankrupt Laws as amended and approved on August 28, 1935, has no application to the real property described in said decree hereinabove set forth.

"It is further Ordered and Adjudged that said bankrupts are not farmers within the meaning of said subsection (s) of said Section 75 of the Bankrupt Laws as amended and [fol. 155] approved on August 28, 1935.

"It is further Ordered, Adjudged and Decreed that the above named bankrupts are not entitled to the benefits of the provisions of sub-section (s) of said Section 75 of the Federal Bankrupt Law as amended and approved on August

28, 1935, and that said petition of bankrupts be and hereby is denied.

"It is further Ordered, Adjudged and Decreed that a trustee be appointed of all the personal property of said bankrupts and that it be sold or otherwise disposed of for the purpose of liquidating the debts of said bankrupts."

That no petition for review of said order was ever filed and no review thereof has ever been had and said order and judgment of said Commissioner aforesaid has become final.

III

That during the foreclosure of the mortgage upon the land described in the schedules attached to the amended petition of the bankrupts filed December 19th, 1934, the bankrupts herein named filed in this court and cause a petition seeking an order restraining the Sheriff of Washington County from executing a writ of assistance ousting the said bankrupts from the possession of the lands described in said foreclosure proceedings and upon said application ex parte a temporary order restraining said Sheriff from the execution of said writ of assistance was made and entered in this cause. That after full hearing upon said petition in which the bankrupts appeared by Counsel, this Court, on December 18th, 1935, duly made, rendered and entered an order and judgment as follows:

[fol. 156] "It appearing further to the Court that said real property was sold by said sheriff prior to the issuance of said restraining order to M. R. Johnson and The United States National Bank of Portland (Oregon) under and pursuant to an execution issued out of said Circuit Court, pursuant to a decree duly made and entered in said Court, that said sale was duly confirmed by said Circuit Court and that said Circuit Court had jurisdiction over said suit and the parties thereto and the subject matter thereof, which jurisdiction it acquired prior to the commencement of any of the proceedings herein, and that by reason thereof the threatened acts of the Sheriff of Washington County (Oregon) would not constitute an interference with any property of the bankrupt as defined by the Acts of Congress.

"It is hereby Considered and Ordered that said temporary restraining order, and the whole thereof, be, and it is, hereby

vacated and set aside and that the application of said bankrupts for the continuance of said restraining order be, and it is, hereby denied."

That no appeal from said judgment and order has even been taken or prosecuted by the bankrupts, and that the time for such appeal has long since expired and said order has become final.

IV

That on the 29th day of August, 1936, pursuant to written notice given to all creditors of said bankrupts by the Conciliation Commissioner a meeting of the creditors of said bankrupts was held at Hillsboro, Oregon, on said date, whereat, on said day Joseph M. Loomis, by the majority vote in number of claimants who had presented their claims against said bankrupt estate and majority in amount of claims, was, by said creditors, duly elected trustee of said bankrupt estate, and on September 3, 1936, said election [fol. 157] aforesaid was, by order made and entered by the Commissioner, duly ratified, and by said order the bond of said trustee was fixed at the sum of \$1000.00. That thereafter said Joseph M. Loomis filed in this cause his bond as such trustee in the sum of \$1000.00 conditioned as by law prescribed and on September 4th, 1936, the said bond, by order of said Commissioner was duly approved and said Joseph M. Loomis thereafter proceeded to administer the assets of said bankrupt estate and has continued so to do in the manner hereinafter more particularly set forth. That the bankrupts filed in said proceeding a notice of appeal and based thereon the said Conciliation Commissioner prepared and filed with the Clerk of this Court a certificate of review of said orders of September 3rd and September 4th, aforesaid. That after due notice and hearing upon such review, on December 14th, 1936, this Court duly made, rendered and entered the following order:

"Martin J. Bernards and Lena Bernards, the above-named bankrupts, having heretofore filed with H. A. Kurathi, Conciliation Commissioner for Washington County, Oregon, their petition for review in the form of and entitled "Notice of Appeal" from that certain order of said Conciliation Commissioner for Washington County, in the above entitled cause, dated August 29, 1936, and that certain order of said Conciliation Commissioner dated September

4, 1936, and said Conciliation Commissioner having transmitted said petition or notice to this court, together with his certificate thereon, and the court having considered the same and being fully advised,

“Now, therefore, it is Considered and Ordered that the aforesaid orders of said Conciliation Commissioner be, and [fol. 158] they are hereby affirmed, and said petition or notice be, and it is hereby, denied.”

That said bankrupts have not appealed from said order and judgment so entered, as aforesaid, and the time for appeal has long since expired and said judgment of this court has become final.

V

That on the 13th day of January, 1937, upon filing by the bankrupts of the petition now pending in this Court and to which this answer is now made, application was made to this court for an order restraining and enjoining Joseph M. Loomis, Trustee, from selling the personal property listed and enumerated in the schedules attached to the amended debtor's petition filed by the bankrupts on December 19th, and after an ex parte hearing thereon such temporary order of restraint was refused and denied by this court. That no appeal has been taken from such order denying said temporary order of restraint.

VI

That during all of the time after the election, confirmation and qualification of the Trustee in this cause, and relying upon the orders and judgments of this court as authority therefor, said Trustee has proceeded with the administration and disposal of the assets of said estate in conformity with the general provisions of the Act of Congress relating to Bankruptcy. That an inventory of all the property of said bankrupts was filed and appraisement thereof was duly made by appraisers duly appointed by order of said commissioner; that at a meeting of the creditors of said bankrupts, duly called and held, upon notice, the sale of the property of said bankrupt estate was authorized, and pursuant to such authorization and the orders of said Commissioner duly made and entered, the personal property, except such portions thereof set out to

the bankrupts as exempt under the laws of the State of Oregon, claimed, designated and selected and received by the bankrupts, was sold at public auction or private sale as directed by said orders of said Commissioner, and your Trustee has received from the sale thereof the sum of \$7,835.06.

VII

That your Trustee, upon order of the Commissioner, has paid out for expenses of securing possession, caring for, preparing for sale, and selling said property, and other expenses of administration, the following sums to the persons named and for the purposes specified:

Name	Purpose	Amount
John Deer Plow Co.,	Sale price Fertilizer Spreader owned by said Company,	\$ 104.58
M. R. Johnson,	For money advanced to enable the Trustee to care for the property, and other expenses, . . .	457.54
M. R. Johnson	For interest on moneys advanced	8.44
Carl Stribich	Repairs on engine and harvester	1.45
Beck's Grocery	Oil and gasoline	3.72
[fol. 160]		
Eugene McCornack	Labor and services and use of truck	15.00
Sam Marshall	For labor	5.00
Kenneth Marshall	For labor	144.00
A. Norene	For labor	25.90
Hillsboro Argus,	Publication of sale notice	13.65
Washington County News Times	Publication—sale notice	7.20
S. E. Fayram	Printing hand bills	7.50
Morning Oregonian	Reader notice of sale	1.68
Oregon Journal	Reader notice of sale	1.38
J. J. Wismer	Clerk at sale	58.09
J. W. Hughes	Auctioneer at sale	174.27
R. J. Nicol & E. W. Olmquist		
Veterinarians	Veterinary service	16.00
E. E. Hanyen	Court reporter for partial transcript of testimony	14.25
E. E. Hanyen	Court reporter, one day's per diem and transcript of testimony Martin J. Bernards	60.00
W. C. Christensen	Appraiser's fee	12.50
Carl G. Bechen	Appraiser's fee	12.50
E. A. Griffith	Appraiser's fee	12.50
Bagley & Hare	Part payment, attorney's fees	250.00
Hamilton Motor Co.	Loading farm machinery	4.00
Burlingham & Sons	For salt for sheep	1.60
Parsons Truck Co.	Transportation of tractor	7.50
Ernest Lehman	Refund excess payment for straw	23.37
Dr. Nicol	Witness fees	2.00
[fol. 161]		
Charles Kyler	Witness fees and mileage	3.00
A. Norene	Witness fees and mileage	3.00
Joseph M. Loomis	Traveling expenses and telephone tolls	45.05
Total paid out		\$1,512.67

That there will be further expenses of administration, the amount whereof at this time cannot be definitely stated, including compensation of Trustee and compensation of attorneys for the Trustee, in addition to the partial payment of attorney's fees heretofore mentioned.

VIII

That there has been presented and allowed as preferred claims against said bankrupt estate and entitled to payment in full, the following claims in favor of the persons named, and for the amount specified, namely:

Name	Purpose	Amount
State Industrial Accident Commission of Oregon	Percentage of pay roll	\$134 62
Peter Bergerson	Chattel Mortgage on sheep as stipulated	232 00
Washington County	Taxes on personal property	593 59
Total Preferred claims		\$960.21

IX

That the following general claims have been presented and allowed:

[fol. 162]

Name	Consideration	Amount
Portland, General Electric Co.	Electric service	\$ 105 08
Delta Drug Store	Drugs and supplies	16 21
Shell Oil Co.	Gasoline and oil	99 22
Ralph Fenton	Medical services	367 50
Floy Constance Arms Executrix	Labor and Material	50 65
Sawtell-Withington & Co.	Services as Accountants	200 00
Dr. A. O. Pitman	Medical services	63 00
MacKenzie Motor Co.	Repairs and parts	33 10
Peter Bergerson	Moneys borrowed	1,720 19
Dr. Harrison D. Hugins	Medical Services	12 50
J. P. Kavanaugh	Legal services	2,825 00
John Luginbohl	Labor	55 00
Hillsboro Feed Co.	Seed and feed	43 92
M. R. Johnson & U. S. National Bank	Deficiency judgment on Foreclosure	18,836 66
Herbert R. Marty	Labor	56 53
A. K. Pickens	Blacksmith services	75 72
Chas. W. Kyler	Labor	60 00
Gordon Vikan	Labor	22 00
P. L. Patterson	Legal services	67 50
First National Bank Forest Grove	Moneys advanced	11 00

[fol. 163]

Name	Consideration	Amount
Raymond E. Watkins	Medical Services	185.00
Dr. R. J. Nicol	Veterinary services	12.50
Emanuel Hospital		
Portland,	Hospital services	50.00
Lucy Duyck	Moneys Borrowed	5,234.98
Lucy Duyck	Moneys borrowed	1,470.44
Winnifred Dellman	Domestic services	75.00
Patricia Duyck	Money borrowed	175.00
Laurelwood Academy	Over-payment upon chopped hay	108.00
Total Common claims		\$32,032.40

X

That the real property described in the schedules attached to the amended debtors petition, filed in this cause December 19th, 1934, which was then subject to the mortgages mentioned and specified in said schedules has been sold upon foreclosure decrees and deeds therefore executed by the Sheriff of Washington County to purchasers at the sale thereof, except the undivided one-eighth interest of the bankrupt in and to the land described in said schedules designated as the seventeenth tract, and your Trustee has not at any time had possession or control of any of the lands described in said schedules. That said undivided one-eighth interest in said tract, specified in said schedules as Tract No. 17, is subject to a mortgage in the sum of \$1500.00 and accrued interest in favor of J. M. Vanderzanden, and said mortgage *and is* a valid mortgage and said J. M. Vanderzanden has sought permission to foreclose the same. [fol. 164] That the amount due upon said mortgage is largely in excess of the fair market value of said undivided one-eighth interest of the said bankrupts, and in fact said bankrupt estate has no substantial interest in said land that would justify the Trustee in incurring expense in the sale thereof.

XI

That the said bankrupts have made no attempt to comply with the conditions required of them by the "Frazer-Lenke" amendment to the Acts of Congress in relation to bankruptcy, necessary to be complied with by them in order to obtain the right and privilege of a three years' stay of enforcement of the obligations owned and held by their creditors and possession of the real and personal property described in the schedules attached to their debtor's petition

on file in this cause on a rental basis, as provided in subdivision "s" of Section 75 of the Bankruptcy Act.

XII

That the said Martin J. Bernards and Lena Bernards, Bankrupts, have never at any time submitted any proposal for a composition and extension which was an equitable and feasible plan for the liquidation of the claims of their secured creditors or other creditors which would result in the financial rehabilitation of the said Bankrupts.

[fol. 165]

XIII

That the said Martin J. Bernards and Lena Bernards at the time of the inception of this proceeding in August, 1934, at the time of the filing of the debtor's petition, on December 19th, 1934, and at all times thereafter, have been in truth and in fact beyond all hope of financial rehabilitation and the only effect of further proceedings and delays on their behalf in this bankruptcy proceeding will be to postpone the inevitable liquidation of their financial affairs without benefit to them and resulting in great hardship to the creditors, preferred and common, of the said bankrupts.

XIV

On account of the allegations and averments aforesaid, and by reason of other matters appearing in the record and files, in this cause and which, by reference, are made a part of this answer, the bankrupts have shown and established that there has at no time since the inception of these bankruptcy proceedings, been any possibility of financial rehabilitation of the bankrupts; that they have been barred and precluded from the relief conditionally granted by subdivision "s" of Section 75 of the Bankruptcy Act.

Wherefore, the Trustee of said Bankrupt estate prays for an order and decree:

1. That the petition of the bankrupts filed in this cause [fol. 166] on January 13, 1937, be dismissed;

2. The orders and judgments of the Conciliation Commissioner herein referred to are final and conclusive on said bankrupts, precluding further consideration of the questions so determined;

3. That the orders and judgments of this court hereinbefore referred to, have become final and said bankrupts bound and precluded thereby;

4. Ratifying and confirming all of the actions of the Trustee in selling and disposing of the personal property listed and enumerated in the bankrupt schedules, and the payment of expenses of said proceeding hereinbefore set forth; and

5. Directing the payment of additional expenses, Trustee compensation and attorneys' fees, preferred claims, and distribution of the remainder of said moneys to the common creditors whose claims have been presented and allowed pro rata, and for such other order and decree as may be proper.

Joseph M. Loomis, Trustee in Bankruptcy.

Bagley & Hare, Attorneys for Trustee in Bankruptcy.

[fol. 167] *Puly sworn to by Joseph M. Loomis. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 168] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO BANKRUPT'S PETITION FILED JANUARY 15, 1937—
Filed September 1, 1937

To the Honorable James Alger Fee, Judge of the above entitled court:

M. R. Johnson and The United States National Bank of Portland, (Oregon), for their answer to the petition of the bankrupts filed herein on January 15, 1937, admit, deny and represent as follows:

I

These answering parties hereby refer to all the records and files in this cause and, by such reference, hereby make the same a part of this answer.

II

On or about April 4, 1930, said bankrupts, being then indebted to M. R. Johnson, one of the aforesaid answering

parties, in the sum of \$70,000.00, made, executed and delivered to him their promissory note for said sum of \$70,000.00 due on or before four months after date, with 8% interest from date until paid, and contemporaneously therewith and to secure the payment thereof made, executed and delivered to said M. R. Johnson their certain mortgage, wherein and [fol. 169] whereby they mortgaged to said M. R. Johnson all that certain real property in Washington County, Oregon, described in the inventory and schedules of said bankrupts herein as parcels 1 to 16, inclusive. Parcel 15 of said lands was, at the date of said mortgage, subject to a prior mortgage held by one Catherine C. Collins, and parcel 16 thereof was subsequently, and on or about February 24, 1931, released by said M. R. Johnson from the aforesaid mortgage, and mortgaged by said bankrupts to the World War Veterans' State Aid Commission of Oregon, and a new mortgage covering said parcel 16 but junior to said last mentioned mortgage was thereafter made, executed and delivered by said bankrupts to said M. R. Johnson.

III

Part of the money loaned by said M. R. Johnson to said bankrupts as aforesaid was borrowed by said M. R. Johnson from The United States National Bank of Portland, (Oregon), and both of the aforesaid mortgages given by the bankrupts to said M. R. Johnson, and also the hereinafter mentioned bonds, were by said M. R. Johnson assigned to said bank in order to secure the aforesaid loan from said bank to said M. R. Johnson. Part of the money so loaned by said M. R. Johnson to said bankrupts was used by said bankrupts to purchase certain waterworks extension bonds of the City of Orenco of the Tualatin Valley, a municipal corporation of the State of Oregon, numbered 6, 7, 8, 9, 10, 11 and 41, of the par value of \$1,000.00 each, except that [fol. 170] \$400.00 had been paid on account of said bond #6, all with interest coupons numbered 18 to 30, inclusive, attached, the entire purchase price of said bonds being paid for out of said loan, and said bankrupts thereupon pledged said bonds with said M. R. Johnson as additional security for said loan.

IV

Thereafter said mortgages to said M. R. Johnson and the pledge of said bonds became in default and, on the 6th day

of April, 1934, said M. R. Johnson and The United States National Bank of Portland (Oregon) filed a suit in the Circuit Court of the State of Oregon, for Washington County, to foreclose said two mortgages and said pledge, and thereafter and on July 11, 1934, after trial of said suit, said Circuit Court made and entered a decree foreclosing said mortgages and said pledge and directing the property included therein to be sold as provided by law. A true copy of said decree is attached hereto, marked "Exhibit A", and by this reference made a part hereof.

V

Pursuant to said decree and to an execution issued thereon, the aforesaid real property was, on June 29, 1935, sold to said M. R. Johnson and The United States National Bank of Portland (Oregon) for the sum of \$65,000.00, and the aforesaid bonds were sold to said purchasers for \$2,541.40. Objections were filed to the confirmation of said sale by said bankrupts, which objections were duly heard by said Circuit Court, and said court on July 20, 1935 over-[fol. 171] ruled said objections and confirmed and approved said sale by an order, a true copy of which is attached hereto, marked "Exhibit B", and by this reference made a part hereof, and said M. R. Johnson and The United States National Bank of Portland, (Oregon) have been entitled to the exclusive possession of all of said real property since the date of said sale, subject only to the rights of the aforesaid Catherine Collins in and to said parcel 15.

VI

Thereafter a writ of assistance was issued by said Circuit Court, directing the Sheriff of Washington County, Oregon to eject and dispossess said Martin J. Bernards and Lena Bernards from all said real property and, thereafter, upon the application of said bankrupts, the above entitled court made a temporary restraining order restraining said sheriff from executing said writ of assistance and requiring him to show cause why said temporary restraining order should not be made permanent. Said sheriff filed his answer and showing of cause thereto and, after hearing thereon, the above entitled court did, on December 18, 1935, dissolve and set aside said temporary restraining order, and thereafter and on or about February 1, 1936, said sheriff removed

said bankrupts from said real property and placed said M. R. Johnson and The United States National Bank of Portland (Oregon) in possession thereof, and said answering parties have ever since been in full possession of said [fol. 172] real property, except said parcel 15 whereof said Catherine Collins is in possession.

VII

Thereafter, and more than a year after the aforesaid sheriff's sale, said sheriff issued his sheriff's deed of said real property to these answering parties, M. R. Johnson and The United States National Bank of Portland (Oregon), and said deed was duly recorded as provided by law.

VIII

These answering parties have leased portions of the aforesaid real property as follows:

The large barn or packing shed thereon to Evergreen Feeding Company, a corporation;

150 acres to George Hendricks and Vernon Burlingham;

72 acres to A. L. Croeni;

22 acres to Chris Rich;

18 acres to David Rich;

10 acres to Wm. Enschede;

The dwelling on one of the Orenco town lots to Wm. Anderson;

The store building on one of the Orenco town lots to C. Beck;

and said tenants, and each of them, are in possession of the premises so leased to them.

IX

Said M. R. Johnson has paid taxes on said real property as follows:

For the year 1930 (balance)	\$2,389.80
For the year 1931 (one-fourth)	715.59
For the year 1935 (all)	1,964.12
For the year 1936 (all)	1,913.58
For the year 1937 (all)	1,857.92
For the year 1931 (one-fourth)	715.59

[fol. 173] and has paid to the World War Veterans' State Aid Commission, on account of principal and interest on the aforesaid mortgage on parcel 16 of said real property to said Commission, the total sum of \$1,248.27.

X

Martin J. Bernards, one of the above-named bankrupts, has from time to time made threats of legal action and of bodily harm against persons dealing with and employed by said M. R. Johnson and, by reason thereof and by reason of the pendency of said bankrupts' petition filed herein on January 15, 1937, said M. R. Johnson has been hampered, interfered with, and damaged in the management and use of said real property, and said answering parties are informed and believe and therefore allege that prospective purchasers have been deterred from purchasing said real property by the aforesaid activities of said Martin J. Bernards.

XI

After the aforesaid sale of real property by the Sheriff of Washington County, Oregon, and his sale of pledged personal property which took place at the same time, there remained and still does remain a large deficiency judgment in favor of these answering parties and against the aforesaid bankrupts, and these answering parties have duly filed their claim herein and are unsecured creditors of said bankrupts therefor.

The personal property of said bankrupts, other than that set aside as exempt to them, has been sold by the Trustee in Bankruptcy herein, and the proceeds thereof in the sum of [fol. 174] something over \$6,000.00 are in the hands of said Trustee for distribution to creditors but, as these answering parties are informed and believe and therefore allege, said Trustee is unwilling to make distribution thereof until said bankrupts' petition filed herein on January 15, 1937 is finally disposed of by the court.

XII

Said bankrupts are not entitled to further consideration herein or to any relief, other than their discharge in bankruptcy, for the following reasons:

(a) All matters contained in and prayed for in said bankrupts' petition filed January 15, 1937, have been adjudicated

and determined herein adversely to the bankrupts, namely, by the aforesaid order of the above entitled court dissolving said temporary restraining order against the Sheriff of Washington County, Oregon, and by the order of the Conciliation Commissioner made and entered herein on August 8, 1936, wherein it was determined, among other things, by said Conciliation Commissioner that said bankrupts could not rehabilitate themselves within three (3) years, that said bankrupts were not farmers within the meaning of subsection (s) of section 75 of the bankruptcy Act, that no bona fide offer of composition or extension had ever been made by them, that said bankrupts had never filed a petition under subsection (s) of section 75 of the Bankruptcy Act, as amended, for appraisal, for the setting aside of their exemptions, or for a stay, and that the court in this proceeding [fol. 175] had, since the aforesaid sheriff's sale, no jurisdiction of the aforesaid real property, parcels 1 to 16, inclusive, and that said bankrupts, at the time of said order, had no interest in said real property, and by the orders of the Conciliation Commissioner made and entered herein on August 29 and September 3, 1936, which orders respectively appointed the trustee herein and approved his official bond. No attempt was made by the bankrupts herein to bring about a review of or appeal from said order of the above entitled court made and entered December 18, 1935 or said order of the Conciliation Commissioner made and entered August 8, 1936, within the time allowed therefor or at all, and both said orders have long since become final. Said bankrupts filed an instrument, denominated a notice of appeal, to said orders of August 29 and September 3, 1936, and the Conciliation Commissioner, pursuant thereto, filed his certificate on review, whereupon said two orders were reviewed by the above entitled court and duly affirmed, and no appeal has been taken or attempted from the order of the above entitled court affirming the same, and the time therefor has long since expired.

(b) The bankrupts are and have, at all times since the commencement of the proceedings herein, been unable to refinance themselves within three (3) years or any other period, for the reason that the amount for which said real property, parcels 1 to 16, inclusive, was mortgaged to these [fol. 176] answering parties, the aforesaid Catherine Collins, and said World War Veterans' State Aid Commission

far exceeded the value of said real property at the time of its purchase by said bankrupts, and since said time the value of said property has greatly depreciated, and the amount of the indebtedness of the bankrupts was increased by the accrual and nonpayment of interest and by the accrual of unpaid and delinquent taxes, and said bankrupts were at no time able and would not now be able to secure a loan or loans on said real property sufficient to refinance themselves.

(c) The bankrupts are not farmers within the meaning of section 75 of the Bankruptcy Act, for the reason that they have no interest in farm land except an undivided one-eighth ($\frac{1}{8}$) interest in and to the real property described in their schedules as parcel 17. They are not engaged in farming and derive no substantial income from renting said parcel 17.

(d) Said parties have not, at any time, submitted any proposal for a composition or extension which was an equitable and feasible plan for the liquidation of the claims of their secured creditors or which would or could result in the financial rehabilitation of the bankrupts, and the purported plans submitted by the bankrupts were not submitted in good faith or with the intention or expectation that they would be accepted by said secured creditors.

(e) The bankrupts have made no attempt to comply with the conditions required of them in order that they might [fol. 177] obtain the rights and privileges of a three year stay of the bankruptcy proceedings and possession of real property on a rental basis as provided in section 75, subsection (s). of the Bankruptcy Act.

(f) The aforesaid real property, parcels 1 to 16, inclusive is not and has not been, since prior to the passage of the present subsection (s) of section 75 of the Bankruptcy Act, property of the bankrupts, and the bankrupts have no interest whatever in or claim against said real property, or any part thereof.

XIII

These answering parties, M. R. Johnson and The United States National Bank of Portland (Oregon), were from April 4, 1930, the date of the first mortgage to said M. R. Johnson, and until the date of sale on the foreclosure of

their mortgages, to wit, June 29, 1935, secured creditors of said bankrupts, and thereafter and since June 29, 1935, have been the sole and exclusive owners of the lands described in their said mortgages, to wit, parcels 1 to 14, inclusive, and parcel 16, subject only to the statutory right of redemption which expired June 29, 1936, but the title to said land in these answering parties is clouded by bankrupts' petition filed January 15, 1937, and by their threats to interpose other proceedings as long as their bankruptcy is pending. The continued pendency of the bankruptcy proceeding herein cannot result in the financial rehabilitation, either [fol. 178] complete or partial, of the bankrupts, and can be of no benefit to the bankrupts but is injuring and will continue to injure these answering parties and all others similarly situated by continuing to cloud their title to real property, and is injuring and will continue to injure the unsecured creditors of said bankrupts, including these answering parties, by preventing the Trustee in Bankruptcy from making distribution, as provided by law, of the money in his hands as aforesaid.

Wherefore, M. R. Johnson and The United States National Bank of Portland, (Oregon) pray for an order and decree as follows:

(1) that the bankrupts' petition filed January 15, 1937 be dismissed;

(2) that the title to the above described lands, parcels 1 to 14, inclusive, and parcel 16, be decreed to be in these answering parties free and clear of all right, title and interest of Martin J. Bernards and Lena Bernards under this bankruptcy proceeding;

(3) that the trustee be ordered to declare a dividend or dividends of the cash in his hands, and that the trustee and Conciliation Commissioner take such other proceedings as will completely close this bankruptcy proceeding;

(4) for such other and further relief as to this court may seem just and proper.

M. R. Johnson, The United States National Bank of Portland (Oregon), by Fred S. Meagher, V. Pres. E. B. Tongue, Platt & Black, Attorneys for M. R. Johnson and The United States National Bank of Portland, (Oregon).

[fol. 179] EXHIBIT "B" TO ANSWER

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE
NINETEENTH JUDICIAL DISTRICT (WASHINGTON COUNTY)

M. R. JOHNSON and THE UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), Plaintiffs,

vs.

MARTIN J. BERNARD (Sometimes Called Martin Bernards)
and Lena Bernards, Husband and Wife; John A. McGee,
B. A. Mitchell, A. O. Pitman, Agnes Bryant and Martin
Bernards, Commissioners of the City of Orenco of the
Tualatin Valley, Oregon; Ellen Pitman, City Recorder
of the City of Orenco of the Tualatin Valley, Oregon;
City of Orenco of the Tualatin Valley, Oregon; Date
Prune Products Company, a Corporation, A. Lindgren;
Regional Agricultural Credit Corporation of Spokane,
Washington, A. R. Sawtell, George T. Withington, and
Henry Meltebeke, Defendants

ORDER OF CONFIRMATION

Now at this time this matter coming on for hearing upon
the objection heretofore filed by the defendants, Martin J.
Bernards and Lena Bernards, husband and wife, to the sale
of the real property made herein, and upon a motion made
in open court by the plaintiffs for an order confirming the
sale of said real and personal property heretofore made,
and hereinafter described, by the Sheriff of Washington
County, Oregon, the plaintiffs appearing personally and by
E. B. Tongue, their attorney, and the defendants, Martin J.
Bernards and Lena Bernards, appearing personally and by
J. P. Kavanaugh, their attorney, and the Court having
taken, received and heard all the evidence produced thereon
[fol. 180] upon the part of the defendants, Martin J.
Bernards and Lena Bernards, and all the evidence produced
thereon on behalf of the plaintiffs, M. R. Johnson and the
United States National Bank of Portland, (Oregon), and

It Appearing to the Court that pursuant to said execution,
judgment, decree and order of sale issued out of and under
the seal of the above entitled court in the above entitled
cause on the 29th day of May, 1935, and issued upon a
judgment and decree rendered in the above entitled court
and cause in favor of the above named plaintiffs and against

the above named defendants, and commanding and directing J. W. Connell, Sheriff of Washington County, Oregon, to make sale of the real and personal property hereinafter described, and out of the proceeds of said sale or so much thereof as may be necessary, to pay, satisfy and discharge the decree and judgment made and entered in the above entitled court and cause on the 11th day of July, 1934, together with the interest and costs and expenses of said writ and sale, and which said real and personal property described in said execution, judgment and decree and order of sale and situate within Washington County, Oregon, is more particularly bounded and described as follows, to-wit:

(Description Omitted by Stipulation.)

[fol. 181] And it Further Appearing to the Court that said Sheriff after giving due and legal notice of the time and place of said sale of the real and personal property for and during the time and in the manner provided by law, the said Sheriff attended at the time and place fixed in said notice for said sale, to-wit: at the East door of the County Court House in Washington County, Oregon, at the hour of ten o'clock in the forenoon of the 29th day of June, 1935, and at said time and place the said Sheriff offered the said personal and real property hereinbefore described for sale, first offering said bonds at public auction to the highest bidder for cash in hand, first offering the same separately, and receiving no bids therefor, and then offered all of said bonds in one parcel, and sold the same to the plaintiffs herein for the sum of \$2500.00, said plaintiffs being the highest and best bidders therefor and \$2500.00 being the highest and best sum bid therefor; said sheriff then offered for sale at public auction to the highest bidder for cash in hand, subject to redemption as provided by law, each parcel of the real property hereinabove described separately and received no bid for any separate parcel thereof; and then offered for sale separately Block 23, First addition to Orenco, claimed to be owned by one G. A. Robson, and received no bid therefor, and then offered for sale separately according to the terms and conditions of said notice, Block 22, First Addition to Orenco, claimed to be owned by one H. E. [fol. 182] Burdette, and received no bids therefor, and then offered for sale separately Lots 3, 4, 5, and 6, Block 24, claimed to be owned by Washington County, Oregon, and

received no bids therefor, and then offered for sale separately the following land claimed to be owned by one B. A. Mitchell, to-wit: Lots 5 and 6 in Block 1, Orenco townsite; Lots, 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 block 15, First Addition to Orenco; Lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 block 16, First Addition to Orenco; Lots 1, 2, 3, 4, 5, 6, and 7 Block 17, First Addition to Orenco; Lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, Block 18 First Addition to Orenco; Lots 6, 7, 8, 9 and 10, Block 19, First Addition to Orenco; the said B. A. Mitchell being then present and bidding upon said property, and that the said lots last hereinabove described, and claimed to be owned by the said B. A. Mitchell, were sold to the plaintiffs herein for the sum of \$75.00, said sum being the highest and best sum bid therefor and the plaintiffs being the highest and best bidders therefor, and that said sale was made subject to redemption as provided by law; the said Sheriff then offered and exposed for sale according to the terms set forth in said notice, in one parcel, all the land hereinbefore described, and described in said execution, judgment, decree and order of sale, except the lots hereinabove described and claimed to be owned by the said B. A. Mitchell, together with all the right, title and interest which the said defendants, Martin J. Bernards and Lena Bernards, and both and each of them, [fol. 183] had in and to said property on the date of the execution of plaintiff's mortgage, to-wit: the 4th day of April, 1930, and all the right, title and interest the said defendants, and each and both of them, have subsequently acquired therein, at public auction to the highest bidder for cash in hand, subject to redemption as provided by law, when the plaintiffs M. R. Johnson and The United States National Bank of Portland (Oregon) bid therefor the sum of \$65,000.00, whereupon said Sheriff duly sold said real property to plaintiffs for the sum of \$65,000.00, they being the highest and best bidders and said sum being the highest and best sum bid therefore, and

It Further Appearing to the Court that on the 29th day of June, 1935, the said J. W. Connell, Sheriff of Washington County, Oregon, made due and legal return into this court upon said execution, judgment, decree and order of sale and of his doings and proceedings therein and thereunder, and filed the same with the clerk of the above entitled court on the 1st day of July, 1935, and that more than fifteen days have elapsed since the filing of said return into this court;

It Further Appearing to the Court that the sale of the personal property hereinabove described was absolute;

It Further Appearing to the Court that the real and personal property hereinabove described was at said time and place sold for more than the fair, reasonable value thereof, and sold for a larger amount and sum that this court would have been justified in fixing as an upset price therefor under [fol. 183] the evidence Submitted herein, and that the objections filed to the confirmation of said sale by the defendants Bernards have not been sustained; and

It Further Appearing to the Court from the evidence introduced and from an examination of the proceedings herein that said sale was in all respects duly and legally and regularly made and conducted and that said execution was in all respects duly and legally and regularly issued and that all proceedings had and done thereunder and pursuant thereto were and are legal, regular and valid, and that plaintiffs are entitled to have said sale confirmed.

It is, Therefore, Ordered, Adjudged and Decreed that the objections to the confirmation of said sale filed herein by the defendants, Martin J. Bernards and Lena Bernards, be and the same hereby are in all respects over-uled and that the request of the said defendants Bernards to have this court fix an upset price upon said land be and the same hereby is denied.

It is Further Ordered, Adjudged and Decreed that the sale of the real property hereinabove mentioned and described and sold by the Sheriff of Washington County, Oregon, to these plaintiffs as hereinabove set forth was and is in all respects legal, regular and valid and that the same be and hereby is in all respects confirmed and approved.

Dated at Hillsboro, Oregon, this 20th day of July, 1935.

(Sgd.) R. Frank Peters, Circuit Judge.

[fol. 185]

EXHIBIT "A" TO ANSWER

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE
NINETEENTH JUDICIAL DISTRICT (WASHINGTON COUNTY)

M. R. JOHNSON and THE UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), Plaintiffs,

VS.

MARTIN J. BERNARDS (sometimes called Martin Bernards)
and Lena Bernards, husband and wife; John A. McGee,
B. A. Mitchell, A. O. Pitman, Agnes Bryant and Martin
Bernards, Commissioners of the City of Orenco of the
Tualatin Valley, Oregon; Ellen Pitman, City Recorder of
the City of Orenco of the Tualatin Valley, Oregon; City
of Orenco of the Tualatin Valley, Oregon; Date Prune
Products Company, a corporation; A. Lindgren; Regional
Agricultural Credit Corporation of Spokane, Washing-
ton; A. R. Sawtell; George T. Withington; and Henry
Meltebke. Defendants

DECREE

This cause came on regularly for hearing, in open court,
on the 6th day of July, 1934, plaintiff M. R. Johnson appear-
ing by E. B. Tongue, his attorney, and plaintiff the United
States National Bank of Portland (Oregon) appearing by
Arthur D. Platt, of its attorneys, and the defendants Mar-
tin J. Bernards and Lena Bernards appearing by J. P.
Kavanaugh, of their attorneys, and none of the other de-
fendants appearing at this time, and

It Appearing to the Court that all the other defendants
have been duly served with summons in this cause and
have not made any appearance herein,

Now, Therefore, on Motion of plaintiffs, by their said
[fol. 186] attorneys, It is Ordered and Adjudged that said
defendants, John A. McGee, B. A. Mitchell, A. O. Pitman,
Agnes Bryant and Martin Bernards, Commissioners of the
City of Orenco of the Tualatin Valley, Oregon, Ellen Pit-
man, City Recorder of the City of Orenco of the Tualatin
Valley, Oregon, City of Orenco of the Tualatin Valley, Ore-
gon, Date Prune Products Company, a corporation, A.
Lindgren, Regional Agricultural Credit Corporation of
Spokane, Washington, A. R. Sawtell, George T. Withington,
and Henry Meltbeke, and each of them, are in default for

want of an answer or other pleading, and said default is hereby entered of record.

The court having heard the evidence submitted on behalf of the plaintiffs and the defendants Bernards, and having heard arguments of counsel, and being fully advised in the premises,

It is Ordered, Adjudged and Decreed as follows:

I

That plaintiffs have judgment against defendants Martin J. Bernards and Lena Bernards, and against each of them, for the sum of \$64,474.33, with interest thereon at the rate of 8% per annum from the 12th day of March, 1931, less \$4,126.00 credit against such interest, for the further sum of \$3,000.00 attorneys' fees, and for their costs and disbursements herein, taxed and allowed at \$47.00.

II

That the pledge by defendant Martin J. Bernards of the following described collateral, to-wit:

[fol. 187] Waterworks Extension Bonds of the City of Orenco of the Tualatin Valley, a municipal corporation of the State of Oregon, as follows:

Nos. 6, 7, 8, 9, 10, 11, and 41, for \$1,000.00 each, but \$400.00 has been paid on account of No. 6, leaving a balance of \$600.00, together with interest coupons attached to each bond and numbered 18 to 30 inclusive;

was and is a valid pledge thereof, and the same is hereby foreclosed, and that the same be sold as upon execution at law, and that at such sale the Sheriff of Washington County, Oregon, deliver the same to the purchaser thereof.

III

That plaintiffs' mortgage set forth and described in plaintiffs' amended complaint and recorded in book 114, on page 521, of the mortgage records of Washington County, Oregon, made, executed and delivered by the defendants Bernards, is a first and valid lien on the real property therein and hereinafter described, and that it be and the same hereby is foreclosed, and that said real property be sold as upon execution at law, and that at such sale the

plaintiffs, or either of them, be authorized to become a purchaser thereof, and that the purchaser at such sale be let into the possession of said property by the Sheriff of Washington County, Oregon.

IV

That plaintiffs' other mortgage, described in their second cause of suit and recorded in book 120, on page 517, of the mortgage records of Washington County, Oregon, Made, [fol. 188] executed and delivered by the defendants Bernards, is a valid lien on the real property therein and hereinafter described, and that it be and the same hereby is foreclosed, and that said real property be sold as upon execution at law, and that at such sale the plaintiffs or either of them, be authorized to become a purchaser thereof, and that the purchaser at such sale be let into the possession of said property by the Sheriff of Washington County, Oregon.

V

That the proceeds of the sales hereinbefore provided for be applied as follows:

- (a) to the costs and disbursements of such sales;
- (b) to the costs and disbursements incurred by plaintiffs in this suit;
- (c) To the payment of the attorneys' fees allowed plaintiffs in this suit;
- (d) to the payment of the sums hereinbefore adjudged to be due plaintiffs herein.

VI

That the property covered by said mortgages herein and hereby foreclosed is described as follows, to-wit:

(All in Washington County, Oregon.)

(Description omitted by stipulation.)

excepting from the foregoing the following parcels of land described in the mortgage records of Washington County, Oregon:

- In book 115 at page 175;
- In book 115 at page 176;
- In book 115 at page 178;
- In book 118 at page 519.

[fol. 189]

VII

That the balance of the proceeds arising from such sales, if any, after the payment of the several sums hereinbefore specified, shall be paid into the registry of this court to be disposed of as the court may direct.

VIII

That, upon the sale of said property, all the right, title and interest that the defendants Bernards, or either of the-, had in or to said property, at the date of the execution of said mortgages, or that either of said defendants has subsequently acquired therein or thereto, be sold, and that the defendants John A. McGee, B. A. Mitchell, A. O. Pitman, Agnes Bryant and Martin Bernards, Commissioners of the City of Orenco of the Tualatin Valley, Oregon, Ellen Pitman, City Recorder of the City of Orenco of the Tualatin Valley, Oregon, City of Orenco of the Tualatin Valley, Oregon, Date Prune Products Company, a corporation, A. Lindgren, Regional Agricultural Credit Corporation of Spokane, Washington, A. R. Sawtell, George T. Withington, and Henry Meltbeke, and each of them, and each and every person claiming by, from, through or under them, or any of them, are adjudged to have no right, title or interest in, lien upon or claim to said mortgaged property, or any part thereof, and that the defendants, and each of them, and every person claiming or to claim by, from, through or [fol. 190] under them, or any of them, be forever barred, foreclosed and enjoined from setting up or claiming any right, title or interest in, lien upon or claim to said property, or any part thereof, except only the statutory right of redemption as to said real property.

IX

That the restraining order heretofore made and entered herein be, and the same hereby is, dissolved.

X

That the sale of the hereinbefore described pledged personal property held as collateral shall be held at the same time as the real property hereinbefore directed to be sold and after notice for the same length of time required for the sale of real property.

XI

That if, after application of the proceeds of the sales of real and personal property hereinbefore directed, there be a deficiency, a judgment for such deficiency be docketed against the defendants Martin J. Bernards and Lena Bernards, and against each of them.

Dated at Hillsboro, Oregon, this 11th day of July, 1934.

George R. Bagley, Judge of the above entitled court.

[fol. 191] *Duly sworn to by M. R. Johnson et al. Jurats omitted in printing.*

[fol. 192] [File endorsement omitted.]

[fol. 193] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF M. R. JOHNSON AND THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON).—Filed February 17, 1938

Come now M. R. Johnson and The United States National Bank of Portland (Oregon) and respectfully move the court herein as follows:

(1) for an order confirming and making effective, so far as may be necessary, that certain order of the Conciliation Commissioner herein declaring that the bankrupts are not farmers within the meaning of subsection (s) of Section 75 of the bankruptcy law and not entitled to the benefit of such subsection (s);

(2) for an order to the effect that the real property described in the schedules herein as appraisals 1 to 16, inclusive, is not within the jurisdiction of this court, and that the bankrupts have no interest therein;

(3) for an order directing said Conciliation Commissioner to proceed to complete the administration of the estate of said bankrupts in the manner provided by the bankruptcy laws of the United States other than said section 75, to order payment of such dividend as may be proper, and [fol. 194] to close this bankruptcy proceeding as soon as may be reasonably possible.

This motion is based on the records and files of the above entitled cause.

E. B. Tongue, and Platt & Black, Attorneys for M. R. Johnson and The United States National Bank of Portland (Oregon).

[File endorsement omitted.]

[fol. 195] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR SUPPLEMENTAL TRANSCRIPT OF RECORD—Filed
March 10, 1939

To G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon:

Please prepare a supplemental transcript of record on appeal in the above case consisting of the following papers:

1 Petition of Martin J. Bernards and Lena Bernards, filed January 15, 1937.

2 Answer of Catherine Collins.

3 Answer of Joseph Loomis, Trustee.

4 Answer of M. R. Johnson and The United States National Bank of Portland, (Oregon).

5 Motion of M. R. Johnson and The United States National Bank of Portland, (Oregon).

Martin J. Bernards, One of the Appellants.

[File endorsement omitted.]

[fol. 196] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 197] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

In the Matter of MARTIN J. BERNARDS and LENA BERNARDS,
Bankrupts, Appellants,

VS.

M. R. JOHNSON, CATHERINE COLLINS, THE UNITED STATES
NATIONAL BANK OF PORTLAND, OREGON and Joseph M.
Loomis, Trustee, Appellees

BANKRUPTS' PETITION FOR LEAVE TO APPEAL UNDER BANK-
RUPTCY ACT, SECTION 24 (b)—Filed June 1, 1938

To the Honorable Judges of the United States Circuit Court
of Appeals for the Ninth Circuit:

Your petitioners, the above named bankrupts, conceiving themselves aggrieved by the two following orders of the United States District Court for the district of Oregon, made and entered on the 10th day of May, 1938, the first designated as an order and decree, the second designated as an order affirming order of Conciliation Commissioner, which orders deny your petitioners all of the benefits of Section 75 of the Bankruptcy Act, and your petitioners file their petition addressed to the discretion of this Honorable Court for leave to appeal in matter of law from the above designated orders of the District Court.

Your petitioners refer to the Assignment of Errors filed by them simultaneously with this petition setting forth the [fol. 198] errors made by the court below and giving the grounds for this appeal and make said Assignment of Errors a part hereof.

On an amended petition in bankruptcy filed in the United States District Court above named on the 19th day of December, 1934, the above named Martin J. Bernards and Lena Bernards were each duly adjudicated as of that date bankrupts, under subsection 's', Section 75 of the Bankruptcy Act, and asked in their petition to be granted all of the benefits of said Act, and that ever since said time have been bankrupts under Section 75, sub-section 's' of the Bankruptcy Act and that the said proceedings have never, to this date, been withdrawn, dismissed, annulled, set aside or vacated and that your petitioners are now and have

been, at all times hereinbefore mentioned, entitled to the full benefits of Section 75, sub-section 's' of the Bankruptcy Act.

The petition for review of the orders of the Conciliation Commissioner and the answer and reply were duly heard for review by the Honorable James Alger Fee, Judge of the United States District Court for the district of Oregon, on the 13th day of April, 1938, and after hearing the oral arguments and examining the records and files in the said case [fol. 199] made and entered the following orders:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF OREGON

No. B-19268

In the Matter of MARTIN J. BERNARDS and LENA BERNARDS,
Bankrupts

ORDER AND DECREE

This matter coming on to be heard before the Honorable James Alger Fee, judge of the above entitled court, upon the motion of Catherine H. Collins, M. R. Johnson and The United States National Bank of Portland (Oregon) and J. M. Loomis, trustee, appearing by their respective attorneys for an order and decree herein based upon the findings of fact and conclusions of law made and filed herein, and the same having been duly considered;

It is Hereby Ordered, Adjudged and Decreed:

1. That the bankrupts' petition filed January 15, 1937 be dismissed.

2. That bankrupts' motion filed April 13, 1938 to vacate and set aside all orders of this Court, etc. be denied.

3. That the title to the real property situated in Washington county, Oregon, hereinbefore described and referred to in Finding of Fact XV and elsewhere in these bankruptcy proceedings as Parcel 15, be and it is hereby decreed to be in Catherine H. Collins free and clear from all right, title and interest of said bankrupts under this bankruptcy proceeding.

[fol. 200] 4. The title to the real property in Washington County, Oregon, hereinbefore described and referred to

in Finding XV and elsewhere in these bankruptcy proceedings as Parcels 1-14, inclusive, and Parcel 16, be and it is hereby decreed to be in M. R. Johnson and The United States National Bank of Portland (Oregon) free and clear of all right, title and interest of Martin J. Bernards and Lena Bernards under this bankruptcy proceeding.

5. That the actions of the trustee in taking possession of and selling and disposing of the personal property listed and enumerated in the bankrupts' schedules and the payment and expenses of said proceeding set forth in the trustee's answer be ratified and confirmed.

6. That the election by the creditors, confirmation by the Conciliation Commissioner and qualification of J. M. Loomis, as Trustee of the bankrupt estate of Martin J. Bernards and Lena Bernards, is in all things regular, and be, and hereby are, confirmed.

7. That the orders of the Conciliation Commissioner hereinbefore made be ratified and approved, and that said orders and the orders of this Court herein be a bar to any further proceedings on the part of the said bankrupts under subdivision "s" of Section 75.

8. That the trustee herein proceed as by law required to pay any additional expenses necessary for him to incur, the trustee's compensation and the fees for his attorney, the [fol. 201] preferred claims and thereupon distribute the remainder of the moneys in his hands to the common creditors of said bankrupts whose claims have been presented and allowed pro rata; and otherwise the trustee and Conciliation Commissioner shall take such proceedings as will speedily complete and close this bankruptcy proceeding.

Dated this 10 day of May, 1938.

(Signed) James Alger Fee, District Judge."

“IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF OREGON

No. B-19268

In the Matter of MARTIN J. BERNARDS and LENA BERNARDS,
Bankrupts

ORDER AFFIRMING ORDER OF CONCILIATION COMMISSIONER

Martin J. Bernards and Lena Bernards, the above named Bankrupts, having heretofore filed with H. A. Kuratli, Conciliation Commissioner for Washington County, Oregon, their petition for review of that certain order of said Conciliation Commissioner, dated the 11th day of January, 1937, denying the petition of said bankrupts, filed with said Commissioner on the 4th day of January, 1937, and said Conciliation Commissioner having duly certified such cause and therewith transmitted said petition, the motion to dismiss the same, and the order of dismissal;

[fol. 202] And the Court having considered the same and the arguments of respective counsel, and being now fully advised;

Now, Therefore, It Is Considered and Ordered that the order of the Conciliation Commissioner of Washington County, Oregon, dated the 11th day of January, 1937, dismissing the petition of said bankrupts, filed on January 4th, 1937, be, and the same hereby is, affirmed:

And It Is Further Ordered that the said Bankrupts are not entitled to the relief, or any part thereof, sought in said petition so filed with said Commissioner on January 4th, 1937.

Dated at Portland, Oregon, on this 10 day of May, 1938.

(Signed) James Alger Fee, Judge of the above entitled Court.”

Said orders of the District Court are erroneous in matter of law in that they deny your petitioners the benefits of Section 75, sub-section “s” of the Bankruptcy Act.

That the said orders above complained of also deny the petitioners the due process of law clause of the 14th amendment to the constitution of the United States.

Wherefore, your petitioners pray that they may be allowed in the discretion of this Honorable Court to appeal

in matter of law herein, that the prayer of said petition be granted and citations be issued directed to all of the appellees above named commanding them to appear before the United States Circuit Court of Appeals for the Ninth Circuit [fol. 203] cuit, to do and receive what may appertain to justice to be done in the premises, and that a praecipe may issue requiring the clerk of the United States District Court for the district of Oregon to transmit the record in this case to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, this 31 day of May, 1938.

Martin J. Bernards, Petitioner; Lena Bernards, Petitioner.

Subscribed and sworn to before me this 31 day of May, 1938. Harry Frazer, Notary Public for the State of Oregon. My commission expires 11/17/41.

[fol. 204] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 1, 1938

Now comes Martin J. Bernards and Lena Bernards, Appellants, and file these Assignments of Error complaining as follows:

I

That the Court erred in making and entering the two following orders on the 10th day of May, 1938, the first designated as an order and a decree, the second designated as an order affirming order of conciliation commissioner, which orders deny the petitioners all of the benefits of Section 75 of the Bankruptcy Act, and particularly sub-section "s" of said section, which orders are included in bankrupts' petition for leave to appeal and also in bankrupts' copy of papers filed to enable the Court to exercise its discretion in considering petition for appeal.

II

That the Court erred in Paragraph I of the order and decree made and entered by the Court on the 10th day of

May, 1938, by decreeing that the bankrupts' petition filed January 15, 1937 be dismissed.

III

That the Court erred in Paragraph II of said order and decree by denying the bankrupts' motion filed April 13, 1938 to vacate and set aside all orders of the Court made in derogation of the bankrupts' rights under Section 75, and particularly sub-section "s" of said Section 75.

[fol. 205]

IV

That the Court erred in Paragraph III of said order and decree in holding that the title to the real property situated in Washington county, Oregon, be decreed to be in Catherine H. Collins, free and clear of all right, title and interest of said bankrupts under this bankruptcy proceeding.

V

That the Court erred in Paragraph IV of said order and decree in decreeing that parcels 1 to 14 inclusive and parcel 16 of bankrupts' real property be decreed to be in M. R. Johnson and the United States National Bank of Portland, Oregon, free and clear of all right, title and interest of the said bankrupts under this bankruptcy proceeding.

VI

That the Court erred in Paragraph V of said order and decree in ratifying and confirming the actions of the trustee in taking possession of and selling and disposing of the personal property listed and enumerated in bankrupts' schedules, for the payment and expenses of said proceeding set forth in trustee's answer.

VII

That the Court erred in Paragraph VI of said order and decree by confirming the election and appointment of J. M. Loomis as trustee of the bankrupt estate of Martin J. Bernards and Lena Bernards.

VIII

That the Court erred in Paragraph VII of said order and decree by ratifying all orders of the conciliation commis-

[fol. 206] sioner before made, ratified and approved and the Appellants cite particular error because of the fact that the conciliation commissioner on the 8th day of August, 1936, made and entered an order denying the bankrupts the benefits of the Act, and in the said order of August 8, 1936, the said conciliation commissioner found that the bankrupts' proposal was in bad faith, when, as a matter of fact, no attack was ever made during the time allowed for such objection, which was during the debtor proceedings, and that the said order of August 8, 1936, also contained the finding that the bankrupts were not farmers within the meaning of the Act, all of which findings and orders were null and void; and the Court further erred in Paragraph VII herein referred to by holding that the orders of the Court be a bar to further proceedings on the part of said bankrupts, under sub-division 's' of Section 75.

IX

That the Court erred in Paragraph VIII of said order and decree by ordering a distribution of the funds in the hands of the trustee and for the payment of compensation and fees for his attorney.

X

That the Court erred in denying the petition of the bankrupts filed on January 4, 1937, asking to be allowed to proceed further under the provisions of Section 75, sub-division 's'.

XI

The Court erred in denying the bankrupts' petition of [fol. 207] January 15, 1937, which petition asked for a review of the proceedings and for the benefits of the Act to be granted the bankrupts.

XII

That the Court erred in making the said order and decree of May 10th, 1938, which order by force and effect of its ruling denied the bankrupts the provision of Section 75, sub-division 's', which is not in accordance with law and is in violation of the due process of law, clause of the 14th amendment of the Constitution of the United States.

XIII

That the Court erred in making an order on May 10, 1938, affirming the order of the conciliation commissioner, H. A. Kuratli, dismissing the petitions of the bankrupts, which was filed on the 4th day of January, 1937 and was ordered dismissed on the 11th day of January, 1937 by said conciliation commissioner.

Martin J. Bernards, One of the Bankrupts; Martin J. Bernards, by Attorney Appearing Specially to Contest the Jurisdiction of the District Court of the United States for the District of Oregon.

[File endorsement omitted.]

[fol. 208] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 8855

BERNARDS ET UX.

VS.

JOHNSON

PETITION AND ORDER EXTENDING TIME—Filed June 8, 1938

Beaverton, Oregon,
June 7, 1938.

Mr. Paul P. O'Brien, Clerk United — Circuit Court of Appeals, Ninth Circuit, San Francisco, Calif.

DEAR SIR:

Your letter of June 4, 1938 in re the above matter stating that the Court had denied the petition for appeal but that the appellants could amend their petition rec'd.

Mr. Bernards is seriously ill and the Doctor in charge of him has directed that he be not disturbed for a few days.

It is possible to grant some additional time? I can furnish you with the affidavit of the attending physician if you desire.

I am yours very truly,

(Signed) Mrs. Lena Bernards, One of the Bankrupts.

P. S.—Inclosed find Air mail self addressed envelope.

Time to file amended petition showing additional facts extended to and including June 30, 1938.

(Signed) Curtis D. Wilbur, Senior United States Circuit Judge.

[File endorsement omitted.]

[fol. 209]

[File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

[Title omitted]

SUPPLEMENT TO BANKRUPTS' PETITION FOR LEAVE TO APPEAL
UNDER BANKRUPTCY ACT, SECTION 24 (b)—Filed June 23,
1938

To the Honorable Judges of the United States Circuit Court
of Appeals for the Ninth Circuit:

Your petitioners, the above named bankrupts, pursuant
to a request of this Court supplement their petition by
the following facts:

I

That your petitioners are bona-fide farmers within the
meaning of Section 75 of the Bankruptcy Act and that their
entire life savings were invested in the real property, farm
and household equipment, which personal property both real
and personal was necessary to carry on their occupation as
farmers, and that one of your petitioners, Martin J. Ber-
nards, has been a farmer all of his life, commencing at
the age of sixteen, and has lived on a farm and tilled the
[fol. 210] same until he was dispossessed in June, 1935.
Reference is hereby made to a copy of the petitioners'
schedule of personal property filed in their debtor proceed-
ings. The same is attached hereto and made a part hereof
the same as if incorporated herein.

II

Your petitioners, in support of Assignment of Errors,
paragraph 1, allege that they filed their petition as debtors
under the farm bankruptcy Act and that during the said

debtor proceedings no creditor, or other person, ever made any objections to your petitioners not being bona-fide farmers and entitled to all of the benefits of the Act, and that afterward your petitioners were duly adjudicated bankrupts and requested in their petition that they be allowed all of the benefits of the said bankruptcy Act, and that during the said bankruptcy proceedings no testimony was ever taken, or objection made, by any creditor, or other person, to the fact that your petitioners were not bona-fide farmers, and that your petitioners have been, at all times, entitled to the full benefits of the Act.

III

For facts in support of paragraph II of your petitioners Assignment of Errors, allege, that the Court had no jurisdiction to dismiss bankrupts' petition filed January 15, 1937, for the reason that your petitioners had been duly adjudicated bankrupts, and that the said adjudication had not been set aside or vacated.

[fol. 211]

IV

Your petitioners allege facts in support of Assignment of Errors, paragraph 111, that your petitioners' motion filed April 13, 193⁹, asking the Court to set aside all orders of the Court made in derogation of bankrupts' rights, under Section 75 and particularly sub-section 's' of Section 75, for the reason that said motion requested the Court and the conciliation commissioner to carry out the mandatory provisions of the Act.

V

Your petitioners, for facts in support of paragraph IV of their Assignment of Errors allege that the Court erred in decreeing the title of real property situated in Washington county to be in Catherine Collins, for the reason that the said sale was had in a state court which had no jurisdiction of the said real property. This property was subject to the exclusive jurisdiction of the bankruptcy Court and could not be delegated.

VI

Your petitioners, for facts in support of paragraph V of Assignment of Errors allege the same facts as set forth in the above paragraph.

VII

Your petitioners, for facts in support of paragraph VI of Assignment of Errors allege that the Court erred in ratifying and confirming the actions of the trustee, for the reason that the said Act does not provide for a trustee.

VIII

Your petitioners allege, for facts in support of Assignment of Errors, paragraph VII, the same facts as set forth in the above paragraph.

IX

Your petitioners, for facts in support of Assignment of Errors, paragraph VIII, allege that the Court had no jurisdiction to affirm the order of the conciliation commissioner made on the 8th day of August, 1936, which order denied the bankrupts the benefits of the Act, for the reason that the said conciliation commissioner never held any hearings nor took any testimony during the debtor proceedings or afterwards, on which to base the said order.

X

Your petitioners, for facts in support of paragraph IX of their Assignment of Errors, allege that the Court erred by ordering a distribution of funds in the hands of the trustee for the reason that Section 75 of the Bankruptcy Act does not provide for a trustee and that his acts were wholly void.

XI

Your petitioners, for facts in support of paragraph X of their Assignment of Errors allege that the Court erred in denying the petitions of the bankrupts filed on January 4, 1937, asking to be allowed to proceed under the provisions of Section 75, subsection 's' for the reason that your petitioners were duly adjudicated bankrupts under Section 75 and that their adjudication had never been attacked, set aside or modified.

[fol. 213]

XII

Your petitioners, for facts in support of paragraph XI of their Assignment of Errors, allege that the Court erred

in denying bankrupts' petition of January 15, 1937, which petition asked for a review of the proceedings and for the benefits of the Act. Your petitioners had, at that time, been denied all of the provisions of the said Act and although they were entitled to have been put in possession of their property, both real and personal and to a three year rental stay, these benefits had all been denied them.

XIII

Your petitioners, for facts in support of paragraph XII of their Assignment of Errors allege that the Court erred in making the said order and decree of May 10, 1938, which order by its force and effect denied the bankrupts all of the provisions of Section 75 and which denial violated the due process clause of the fourteenth amendment of the Constitution of the United States.

XIV

Your petitioners, for facts in support of paragraph XIII of their Assignment of Errors allege that the Court erred in making an order on May 10, 1938, affirming the orders of the conciliation commissioner for the reason that all orders of the conciliation commissioner were contrary to Section 75 of the Bankruptcy Act and that the said commissioner was without jurisdiction to remove your petitioners [fol. 214] from all of the benefits of the said Act.

Martin J. Bernards, One of the Bankrupts.

Subscribed and sworn to before me this 21 day of June, 1938. Harry Frazer, Notary Public for Oregon. My Commission Expires Nov. 17/1941.
(Seal.)

[fol. 215] SCHEDULE "B" TO SUPPLEMENT TO PETITION

(5)

Personal Property

450 Tons of Chopped Hay.

2 Tons of Vetch Seed.

110 Tons of Baled Straw.

4 Horses.

1 Cow.

225 Ewes.

260 Lambs.

Said ewes and lambs mortgaged to Peter Bergersen.
Amount due on note and mortgage, \$1,340.82.

1 Caterpillar 34 Combine, with pickup attachment.

1 TA 40 International Tractor, Crawler Type.

1 22-36 International Tractor.

1 15-30 International Tractor.

2 Big Six McCormick-Deering Mowers.

1 12-foot McCormick-Deering Rake.

1 4-bottom 16-inch John Deere Tractor Plow.

1 3-bottom 14-inch John Deere Tractor Plow.

1 Papee 3-row Hay Cutter.

1 28-foot Corrugated Roller.

1 22-foot Spring Tooth Harrow.

1 33-foot Six Section Peg Tooth Harrow.

1 10-foot Van Brunt Drill.

1 7-foot Wooden Roller.

2 8-foot 22 inch Tandem Covercrop Discs.

1 10-foot 16-inch Tandem Tractor Disc.

[fol. 216] 1 14-inch Walking Plow.

1 16-inch Walking Plow.

1 16-foot Land Plaster Seeder.

1 Hay Tedder.

1 3-horse McCormick-Deering Cultivator, 2-row.

2 2-horse Cultivators.

2 1-horse Cultivators.

1 1-horse Clod Smasher.

1 1-horse Weeder.

1 set Chop Tools.

1 Clipper Power Fanning Mill.

1 Hand Fanning Mill.

2 Sets of Harness.

3 Wagons.

3 Hay Racks.

1 3½ Bain Wagon and Box.

1 Universal Logging Trailer.

2 5-ton White Trucks, 1925 Models.

1 3½-ton White Truck, 1921 Model.

2 3-ton Packard Trucks, 1918-1919 Models.

1 1928 Buick Sedan Automobile.

- 1 1933 Ford Pickup Automobile.
- 1 2300-gallon Gasoline Tank.
- 1 5000-gallon Gasoline Tank.
- 1 11x12 Fairbanks-Morse Air Compressor.
- 1 Air Tank, 18 inches by 6 feet.
- 1 Upright Steam Boiler, 6 horse, in possession of Portland Machinery Co.
- [fol. 217] 1 Fodder Chopper.
- 1 New Fertilizer Spreader, purchased on conditional sales contract from John Deere Plow Co., balance due \$140.00.
- 1 used Fertilizer Spreader.
- 1 Blower, at American Sheets Metal Works, Portland, Oregon.

Water Works Extension Bonds of City of Orenco of Tualatin Valley, a municipal corporation of the State of Oregon, as follows: Nos. 6, 7, 8, 9, 10, 11, and 41, for \$1,000.00 each; \$400.00 has been paid on account of No. 6, leaving a balance of \$600.00; together with coupons attached to each bond. Said bonds are pledged with United States National Bank of Portland (Oregon) as security for payment of loan of M. R. Johnson to said United States National Bank of Portland (Oregon).

[fol. 218] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

ORDER SUBMITTING PETITION FOR ALLOWANCE OF APPEAL—
June 2, 1938

Ordered petition for allowance of appeal herein under section 24b of the Bankruptcy Act submitted to the court for consideration and decision.

[fol. 219] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

ORDER ALLOWING APPEAL—July 9, 1938

Upon consideration of the petition of Martin J. Bernards and Lena Bernards, for allowance of appeal herein under section 24b of the Bankruptcy Act, filed June 1, 1938, and of the assignments of error thereon, filed therewith, and of

the supplement to said petition, filed June 23, 1938, and by direction of the court,

It Is Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the orders of the District Court of the United States for the District of Oregon made and entered on the 10th day of May, 1938, be, and the same hereby is allowed, conditioned upon the giving of a cost bond in the sum of Two Hundred and Fifty Dollars (\$250.00) with good and sufficient security, within ten days from date.

It Is Further Ordered that if an appeal has been heretofore allowed in this cause by said District Court, and a cost *cost* bond given on such appeal, then no additional cost bond need be given on this appeal.

[fols. 220-221] Citation in usual form showing service on M. R. Johnson et al. filed July 20, 1938, omitted in printing.

[fol. 222] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

ORDER GRANTING APPLICATION OF APPELLANTS TO PROSECUTE
APPEAL IN FORMA PAUPERIS—August 15, 1938

Upon consideration of the application of appellants, filed July 18, 1938, for leave to prosecute appeal in the above-entitled cause in forma pauperis, without the prepayment of costs, and good cause therefor appearing, It Is Ordered that said application be, and hereby is granted.

[fol. 223] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

[Title omitted]

MOTION FOR WRIT OF CERTIORARI TO CORRECT DIMINUTION OF
THE RECORD—Filed November 21, 1938

To the Honorable Chief Justice and Associate Justices of
the above entitled court:

M. R. Johnson and The United States National Bank of
Portland (Oregon), appellees in the above entitled cause,

suggest to this court that, in the above cause which is pending in this court on appeal, the transcript of record heretofore duly certified and filed herein is incomplete, and that there is a diminution of the record in said cause in that the papers hereinafter described, which are a part of the record in said cause and are important for a proper understanding of the questions raised in this court, are not included in and made a part of said transcript of record.

Wherefore, appellees move that this court issue its writ of certiorari directed to the District Court of the United States, for the District of Oregon, commanding that court to certify and send to this court said papers which are of record in that court in this cause and which are particularly described as follows:

(1) paragraphs I to XXI of order of Conciliation Commissioner dated August 8, 1936, omitting therefrom copy of foreclosure decree rendered by Circuit Court of the State of Oregon, for Washington County, and also omitting copy of order set forth on page 17 of said order:

(2) amendment of December 2, 1914 to rule 1 of bankruptcy rules of United States District Court, for the District of Oregon.

[fol. 224] Duly certified copies of said papers are attached hereto and by this reference made a part hereof.

In support of this motion, said appellees respectfully show that the portion of the order of August 8, 1936 hereinbefore described contains findings of fact material to issues which will be raised on this appeal, to wit, the ability of the bankrupts to rehabilitate themselves financially and the compliance of the bankrupts with the provisions of section 75 of the Bankruptcy Act as amended and with the conditions precedent to the allowance of relief to them under subsection (s) of said section and said appellees further show the court that said portion of said order was inadvertently omitted from their counterpræcipe heretofore filed with the clerk of said District Court upon the mistaken assumption that the matters set forth therein were duplicated in other portions of the record.

The copy of the above-mentioned court rule was omitted from said counterpræcipe on the theory that this court would take judicial notice thereof, but said appellees have

since been advised that there is a doubt as to this and therefore desire its incorporation in the record.

Dated at Portland, Oregon, this 3d day of November, 1938.

Platt & Black, Counsel for appellees.

[fol. 225] *Duly sworn to by A. D. Platt. Jurat omitted in printing.*

[fol. 226] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE OF APPELLEES FOR ADDITIONAL RECORD—Filed
October 24, 1938

To the clerk of the above entitled court:

You are hereby requested, in aid of an application of the appellees for a writ of certiorari to correct diminution of the record herein, to prepare a supplementary transcript of record on the appeal herein to the United States Circuit Court of Appeals, for the Ninth Circuit, in addition to the portions of the record already indicated by appellants and appellees herein to be included in said transcript, and to include therein the following:

(1) paragraphs I to XXI of order of Conciliation Commissioner dated August 8, 1936, omitting therefrom copy of foreclosure decree rendered by Circuit Court of the State of Oregon, for Washington County, and also omitting copy of order set forth on page 17 of said order;

(2) amendment of December 2, 1914 to rule 1 of bankruptcy rules of United States District Court, for the District of Oregon.

Dated at Portland, Oregon, this 24th day of October, 1938.

George R. Bagley, Wm. L. Brewster, Platt & Black,
Attorneys for Appellees.

I hereby certify that I served the within praecipe on Martin J. Bernards and Lena Bernards, appellants herein, by mailing a true copy of the same this 24th day of October, 1938, to each of them at Beaverton, Oregon.

A. D. Platt, of Attorneys for Appellees.

[File endorsement omitted.]

[fol. 227] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

B-19268

In the Matter of MARTIN J. BERNARDS and LENA BERNARDS,
Bankrupts

DECREE—Filed August 8, 1936

Now at this time this matter coming on for hearing upon the petition of the bankrupts filed herein on the 15th day of July, 1936, and the answer thereto and cross petition filed herein on behalf of M. R. Johnson and the United States National Bank of Portland, (Oregon), a corporation, and the reply to said answer and petition, the above named bankrupts appearing in person and by Glenn B. Jack, their attorney, and the said M. R. Johnson and The United States National Bank of Portland, (Oregon), a corporation, appearing in person and by E. B. Tongue, their attorney, and the court having heard all the evidence introduced by and on behalf of the said bankrupts, and the said M. R. Johnson and The United States National Bank of Portland (Oregon), a corporation, and the admissions of the bankrupts, and the arguments of Counsel, and after having made an examination of the records herein, and from said petition, answer, reply and other evidence introduced herein on behalf of the respective parties, it appears to the Court:

I

That on the 4th day of April, 1930, the above named [fol. 228] bankrupts made, executed and delivered to M. R. Johnson their certain promissory note in the sum of \$70,000.00 due on or before four months after date, and that in order to secure payment of said note, principal and interest and costs and disbursements and attorneys' fees as therein provided, the said bankrupts made, executed and delivered to the said M. R. Johnson their certain indenture of mortgage wherein and whereby they conveyed to the said M. R. Johnson, as security aforesaid, all the real property described in said mortgage and designated therein as Tracts Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16, and which is described in that certain decree, a copy of which is hereinafter set forth; that said mortgage was duly filed

for record and duly recorded on the 4th day of April, 1930, in Book 114, at page 521 of the Records of Mortgages for Washington County, Oregon; that thereafter, a portion of said property was released from the effects of said mortgage in order to enable the said bankrupts to obtain a loan of \$3000.00 thereon from the World War Veterans State Aid Commission and said bankrupts, having secured a loan from said Commission for said amount, in order to secure payment thereof, made, executed and delivered to the said Commission their certain indenture of mortgage wherein and whereby they conveyed to said Commission said tract of land designated as tract No. 16, and which mortgage is recorded in Book 117, page 324, of the records of Mortgages for Washington County, Oregon; and that thereafter, to-wit: on the 24th day of February, 1931. Pursuant to agreement, [fol. 229] said bankrupts made, executed and delivered to the said M. R. Johnson, in order to secure said note herein mentioned of \$70,000.00, a second mortgage upon said tract No. 16, and which mortgage was duly filed for record on the 1st day of August, 1932, and duly recorded in Book 120 at page 517 of the Records of Mortgages of Washington County, Oregon, and that the land described in said decree and designated therein as Tract No. 16 is subject to the said Johnson mortgage only as a second lien thereon; that \$45,500.00 of the said \$70,000.00 represented by said note and mortgage was advanced to said bankrupts for the purpose of and was used by said bankrupts for the purpose of purchasing all the lands described in said decree, copy of which is hereinafter set forth, except the land therein designated as Tract No. 15; that said two mortgages executed by said bankrupts to and in favor of the said M. R. Johnson was assigned by the said Johnson to The United States National Bank of Portland (Oregon), a corporation, as collateral security to secure a loan made by the said Bank to the said M. R. Johnson and which sum so loaned By Said Bank to said M. R. Johnson was loaned to said bankrupts and is a part of and embraced in the said note of \$70,000.00.

II

That thereafter, to-wit: on the 6th day of April, 1934, a suit in equity was instituted in the Circuit Court of the State of Oregon for Washington County wherein M. R. Johnson and The United States National Bank of Portland

(Oregon), a corporation, were plaintiffs, and the said bankrupts, Martin J. Bernards and *and* Lena Bernards, his wife, [fol. 230] and others were defendants, for the purpose of securing a judgment upon said note for the sum of \$70,000.00 and the foreclosure of said mortgages given to secure the same and that after trial had thereon, and on the 11th day of July, 1934, a decree was rendered and entered in said court and cause, a copy of which decree, omitting the title of the court and cause is in words and figures as follows, to wit:

III

That thereafter, towit: on the 29th day of May, 1935, an execution, decree and order of sale was issued out of and under the seal of said Court directing the Sheriff of Washington County, Oregon, to sell all the real property therein described, and described in said decree, and that thereafter, towit: on the 29th day of June, 1936, pursuant to said execution, judgment, decree and order of sale the said Sheriff of Washington County, Oregon, sold all the real property described in said execution and in said decree, hereinabove set forth, to the said M. R. Johnson and the United States National Bank of Portland (Oregon), a corporation, for the sum of \$65,075.00.

IV

That thereafter the said bankrupts filed objections to the confirmation of said sale, and that upon a full hearing before said Court, said Court overruled said objections to the confirmation of said sale, and upon the 20th day of July, 1935, made and entered an order in said foreclosure suit in all respects confirming and approving said sale.

[fol. 231]

V

That thereafter, towit: on the 25th day of January, 1936, a writ of assistance was issued by the Clerk of said Circuit Court pursuant to an order of said Court, directing the Sheriff of Washington County, Oregon, to dispossess the bankrupts of said property described in said decree.

VI

That thereafter, towit: on the 25th day of January, 1936 the said Sheriff of Washington County, Oregon, pursuant

to said writ of assistance issued and delivered to him out of said Court, on the 25th day of January, 1936, disposed the said bankrupts of said property and turned over the possession thereof to the said M. R. Johnson and The United States National Bank of Portland, (Oregon), who are now and ever since said date have been in possession of said real property.

VII

That at the time of the sale of said real property, as hereinabove set forth, on said execution in said foreclosure suit, the Sheriff of Washington County, Oregon, delivered [fol. 232] to the said M. R. Johnson and The United States National Bank of Portland, (Oregon), a corporation, Sheriff's certificate of sale to said real property described in said decree and in accordance with the laws and statutes of the State of Oregon; that upon the 1st day of July, 1936, no redemption of said real property from said Sheriff's sale having been made, and upon presentation of said certificate of sale to said Sheriff, the said Sheriff of Washington County, Oregon, pursuant to the laws and statutes of the State of Oregon in such cases made and provided, made, executed and delivered to M. R. Johnson and The United States National Bank of Portland (Oregon), a corporation, a sheriff's Deed wherein and whereby said Sheriff conveyed to the said M. R. Johnson and The United States National Bank of Portland (Oregon), a corporation, all the real property described in said decree, a copy of which is hereinabove set forth, and that said deed was duly filed for record on the 1st day of July 1936, in the office of the recorder of conveyances of Washington County, Oregon, and duly recorded in book 159 at page 406 of the records of deeds for said County, and that the said M. R. Johnson and The United States National Bank of Portland (Oregon), a corporation, are now and ever since the 1st day of July, 1936, have been the owners in fee simple of said lands described in said decree except tract designated as tract No. 15, and that the said M. R. Johnson and the United States National Bank of Portland (Oregon), a corporation, are now and ever since the 29th day of June, 1935, have been in possession of all agricultural property set forth and described in said decree except tract No. 15, containing approximately 80 acres.

VIII

That upon the 31st day of October, 1929, the said Martin J. Bernards and Lena Bernards, made, executed and delivered to Catherine Collins their certain promissory note in the sum of \$10,300.00 and in order to secure the payment thereof, made, executed and delivered to the said Catherine Collins their certain mortgage wherein and whereby they conveyed to the said Catherine Collins, as security aforesaid, all the land described in said decree as tract No. 15; that thereafter the said Catherine Collins instituted a suit in equity in the Circuit Court of the State of Oregon for Washington County against Martin J. Bernards and Lena Bernards, the above named bankrupts, and M. R. Johnson and The United States National Bank of Portland, (Oregon), a corporation, and others to foreclose said mortgage, and thereafter, on the 12th day of July, 1935, the said Circuit Court made, rendered and entered its decree in said cause wherein the said Catherine Collins was awarded a judgment against the said Martin J. Bernards and Lena Bernards in the sum of \$8284.00 with interest thereon at the rate of $5\frac{1}{2}\%$ per annum since October 31, 1935, together with \$150.00 attorney's fees and costs and disbursements taxed at \$27.65 and foreclosing said mortgage; that on the 20th day of July, 1935, there was issued out of said Circuit Court in said foreclosure suit an execution, and thereafter, to wit: on August 26th, 1935, pursuant to said execution, the Sheriff of Washington County, Oregon, sold said land, [fol. 234] designated as Tract No. 15, to Catherine Collins for the sum of \$10,689.35, and that all the right, title and interest of the said M. R. Johnson and The United States National Bank of Portland (Oregon), a corporation, was foreclosed in said suit except the statutory right of redemption of the said Johnson and the said Bank which has since expired without any redemption having been made.

IX

That since the date of the execution of said mortgage executed to the said M. R. Johnson and The United States National Bank of Portland (Oregon), a corporation, and pursuant to tax foreclosure decree, deeds have been executed and delivered by proper authority to the following described lands, to wit:

Block 23, 1st Addition to Orenco;

Block 22, 1st Addition to Orenco;

Lots 3, 4, 5 and 6, Block 24, 1st Addition to Orengo;

Lot 5 and 6 Block 1, Orengo Townsite;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 Block 15, 1st Addition to Orengo;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 Block 16, 1st Addition to Orengo;

Lots 1, 2, 3, 4, 5, 6 and 7, Block 17, 1st Addition to Orengo;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, Block 18, 1st Addition to Orengo;

Lots 6, 7, 8, 9, and 10, Block 19, 1st Addition to Orengo;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, Block 20, 1st Addition to Orengo;

and also 164.76 acres of the agricultural land covered by the mortgages of said M. R. Johnson and The United States National Bank of Portland (Oregon), a corporation, was sold to Washington County, Oregon, on the 29th day of April, 1933, pursuant to a decree in a tax foreclosure suit in which Martin J. Bernards and Lena Bernards were defendants, and which lands were conveyed to the said Washington County, Oregon by deed executed to said County by [fol. 235] the Sheriff of Washington County, Oregon, and which was filed for record on June 10, 1933, and duly recorded in book 151, page 330, of the records of deeds for said County and State.

X

That thereafter on the -- day of --, 1935, a tax foreclosure suit was instituted against the said Martin J. Bernards and Lena Bernards for taxes for the year 1930 and prior years to foreclose taxes upon the following lands covered by said decree, as hereinabove set forth, to wit:

165.68 acres in Sections 27 and 34, Township 1 North, Range 2 West, W. M. as described in Volume 14, page 36, deed records and 8.07 acres as shown by survey. Surveyor's Office, Washington County, Oregon, less 1.82 acres for road, less 76.73 acres as described in Vol. 140 page 578, Deed Records of Washington County, Oregon.

74.18 acres as by survey of Wilkes in Sec. 34 T 1 N R 2 W. W.M. as described in Vol. 144 page 8, Deed Records of Washington County, Oregon.

161.04 acres by Wilkes Survey in NW $\frac{1}{4}$ Sec. 35, NE $\frac{1}{4}$ Sec. 34; SW $\frac{1}{4}$ Sec. 26 and SE $\frac{1}{4}$ Sec. 27, all in T1N.R. 2 W.

W.M. as described in Vol. 144, page 8, Deed Records of Washington County, Oregon.

Orengo, Lots 1, 2 and 3 in Block 2; and W $\frac{1}{2}$ of Lot 5 and all of Lot 6, Block 2.

XI

That there has been released from the effects of said mortgages executed by said bankrupts to the said M. R. Johnson those certain tracts or parcels of land described in Paragraph XI of the petition and answer of the said M. R. Johnson and The United States National Bank of Portland (Oregon), a corporation, on file herein.

[fol. 236]

XII

That all of said lands described in said mortgages, and in said decree as hereinabove set forth, except parcel No. 15, were formerly owned by the Oregon Nursery Company, and on the 23rd day of February, 1929, the said lands were sold by the Sheriff of Washington County, Oregon, pursuant to a decree of the Circuit Court of the State of Oregon for Washington County, to satisfy a judgment and decree of foreclosure for the payment of bonds outstanding against the Oregon Nursery Company, and at said sale and after competitive bidding Block 21, First Addition to Orengo was sold to A. C. Burdette for the sum of \$10.00 and all remaining property, pursuant to said decree, was sold to Mary Smidt for the sum of \$45,500.00 and thereafter, to-wit: on or about the 4th day of April, 1930, the said Mary Smidt sold, assigned and transferred her said Sheriff's certificate of sale to the said Martin J. Bernards for the sum of \$45,500.00.

XIII

That upon the 10th day of August, 1934, the said Martin J. Bernards and Lena Bernards filed in the United States District Court for the District of Oregon their certain petition pursuant to Section 75 of the Bankruptcy Act for the purpose of offering to their creditors a composition of, or extension of time, for the payment of their debts and that said petition was on the 10th day of August, 1934, approved by the United States District Court for the District of Oregon, and that said petition was thereafter referred for further proceedings to A. W. Hoffman, the then duly appointed qualified and acting Commissioner under said

Section 75 of the Bankruptcy Act for the County of Washington, State of Oregon.

XIV

That on September 5, 1934, and pursuant to a notice published by A. W. Hoffman, Conciliation Commissioner for Washington County, Oregon, as aforesaid, the first meeting of the Creditors of the said Martin J. Bernards and Lena Bernards was heard at the County Court House in Washington County, Oregon, and at said time the said Martin J. Bernards and Lena Bernards presented in writing as their proposal for composition or extension a purported proposal, the body of which omitting the heading and signatures was and is as follows:

"We, Martin J. Bernards and Lena Bernards, the debtors above named, submit the following proposal for composition of and extension of debts in the above entitled cause:

1. That the debts secured by mortgages on real property be composed by Federal Financing through loans secured from the Federal Land Bank in an amount satisfactory to the mortgagees and mortgagors.

2. That debts secured by personal property be paid in full. The moneys derived from these loans were used principally for seeding and harvesting.

3. That unsecured debts be paid in full on or before April 1, 1935, except that we request to be permitted to pay the claim of Charles Kyler in the sum of \$100.00; Winifred Wible in the sum of \$75.00; Ted Crane in the sum of \$23.50 and Gordon Vikan in the sum of \$22.00. The claims last mentioned are for labor performed on the farm during the cultivation and harvesting of the present crop. Dated September 5th, 1934."

That said debtors did not have at the time of said written [fol. 238] offer any application pending with any Federal financing agency or corporation for any loan whatsoever and that the application to the Federal Land Bank of Spokane, Washington, by the said bankrupts for a loan had been refused.

XV

That said Martin J. Bernards and Lena Bernards failed to secure the written consent of the majority of their

creditors, either in number or amount, to their co-called proposal of composition or extension, and said Conciliation Commissioner made his report to the above entitled court that no composition or extension could be effected.

XVI

That thereafter, and on the 27th day of October, 1934, the said Martin J. Bernards and Lena Bernards applied to the above entitled court for an order again referring said matter to said A. W. Hoffman, Conciliation Commissioner, and pursuant thereto an order was made re-referring said cause, and that a meeting was thereafter advertised by said A. W. Hoffman, Conciliation Commissioner, to be held on December 4, 1934, at which meeting the said Martin J. Bernards and Lena Bernards submitted in writing a purported offer of composition or extension, the body of which, omitting the heading and signatures, was and is as follows:

"Offer \$45000.00 for mortgage on our entire Orenco farm consisting of approximately 760 acres.

From this amount will be deducted the 5% of the amount Land Bank Loan, amounting to approximately \$1875.00.

[fol. 239] There will be deducted also the taxes now due of approximately \$15000.00 less the value of the Orenco bonds of about \$7000.00.

The Chattel Mortgage principal in full April 1st.

To common creditors, we have on hand 600 tons of No. 1 chopped hay and some grain feed which we wish to market to the best interests of common creditors.

To J. M. Vanderzanden a real estate mortgage in a like proportion.

We ask consent of creditors to the immediate payment of \$75.00 to Winifred Waible, \$60.00 to Charles Kyler; \$22.00 to Gordon Vikan and \$23.00 to Ted Crane for labor performed in the production of the last year's crops."

That at the time of said written offer of composition, as aforesaid, the above named Martin J. Bernards did not have the sum of \$45,000.00 less 5% thereof to be deducted therefrom, or any offer or commitment for a loan of said sum to them.

XVII

That prior to the time said two written offers of composition and extension were made by the said Bankrupts to their

creditors as hereinabove set forth, the said Martin J. Bernards had received from the Federal Land Bank of Spokane a letter bearing date of May 7, 1934, which omitting the heading and ending, is in words and figures as follows:

"After fair and reasonable appraisal of your property and a careful consideration of your loan application, we regret to advise that we cannot grant your request.

It is not indicated that this property has been operated to any advantage and there is no assurance that the returns therefrom in the future would exceed those of the past.

It appears that you have a very small cash investment and equity in this property and your indebtedness is so excessive that a loan based upon your loan value would not approach an amount that would meet your needs and be of [fol. 240] any assistance to you in settling that indebtedness. Part of the farm is foul with Morning Glory over which suitable control methods have not been set up.

We regret our inability to be of service to you but in view of the above mentioned adverse factors and in view of the various surrounding factors disclosed in this case we do not see our way clear to make a commitment of any amount."

and which letter was received by said bankrupts in May, 1934.

XVIII

That the said Martin J. Bernards and Lena Bernards failed to secure the written consent of a majority of their creditors, either in number or amount, to said purported offer of composition or extension, and thereafter the said A. W. Hoffman, Conciliation Commissioner, again reported to the above entitled court that no composition or extension could be effected.

XIX

That on the 19th day of December, 1934, the said Martin J. Bernards and Lena Bernards filed in the above entitled court their amended petition to be adjudged bankrupts under Section 75 of the Bankrupt Law, and on the same date an order of adjudication was made therein adjudging the said Martin J. Bernards and Lena Bernards to be bankrupts, and attached to said petition was schedule of their debts, and which schedule disclosed that the debts of said bankrupts, aside from their indebtedness to the said M. R.

Johnson, and the said Catherine Collins, amounted to the sum of \$——.

XX

That thereafter, towit: on the 28th day of June 1935, the [fol. 241] said Martin J. Bernards and Lena Bernards applied to the above entitled court for an order referring for the third time said matter to A. W. Hoffman, Conciliation Commissioner, and said application was denied by an order of the same date, a portion of which order is in words and figures as follows, towit:

"And it appearing to the Court that said debtors have heretofore been adjudged bankrupts, and their bankruptcy proceeding is now pending before Willard L. Marks, Referee in Bankruptcy.

And it further appearing that the secured creditor has already been delayed approximately one year by proceedings under these acts,

It is Ordered that said petition be and the same hereby is denied."

XXI

That on the 24th day of August, 1935, an order was made and entered by the Honorable R. Frank Peters, Judge of the Circuit Court of the State of Oregon for Washington County, in the suit instituted by the said M. R. Johnson and The United States National Bank of Portland (Oregon), a corporation, against said bankrupts and others to foreclose said mortgage, directing the Clerk of said Court to issue a writ of assistance, and pursuant thereto a writ of assistance was issued directed to J. W. Connell, Sheriff of Washington County, Oregon, to eject and dispossess the said Martin J. Bernards and Lena Bernards from all the real property described in said bankrupts schedule and designated as Parcels Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16, and that thereafter, towit: on the 3rd day of October, 1935, upon an application made in the above entitled court by said bankrupts the said Court made its temporary restraining order, restraining the Sheriff of Washington County, [fol. 242] Oregon, from executing said writ of assistance, and thereafter, on the 18th day of December, 1935, upon a hearing before the above entitled court to show cause why said temporary restraining order should not be made permanent or dissolved, the court made and entered an or-

der, a copy of which omitting the title of the court and cause, is in words and figures as follows, towit:

XXII

That since the filing of said schedules by the above named bankrupts, said bankrupts have used and converted to their own use much of the property shown in said schedules and have received from a portion of said personal property an amount in excess of \$5000.00, and the remainder of said personal property is fast depreciating in value and will be lost or destroyed unless a trustee is appointed to take possession thereof, and that there is no reasonable hope of the rehabilitation of said bankrupts within the meaning of said section 75 of the Bankrupt Laws of the United States of America.

Omitted by direction of Appellees.

Dated this 8th day of August, 1936.

H. A. Kuratli, Conciliation Commissioner.

[File endorsement omitted.]

[fol. 242a] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO RULES—Filed December 2, 1914

Now, at this time, it is ordered that the following be, and the same is hereby adopted as a rule of this court, towit:

In all cases in which a review by this court of the action or decision of the referee in bankruptcy is sought, the petition for review must be filed with the referee within 20 days from the date of the order or action sought to be reviewed. And thereupon, the referee, whose action or decision is sought to be reviewed shall, within ten days from the date the petition for review is filed with him, file in this court all the record and papers, or certified copies thereof, necessary to a hearing in this court.

Dated Dec. 2, 1914.

Chas. E. Wolverton, R. S. Bean, Judge.

[fol. 243] Clerk's Certificate to foregoing papers omitted in printing.

(Endorsed:) Motion for writ of certiorari for diminution of record. Filed Nov. 1, 1938. Paul P. O'Brien, Clerk.

[fol. 244] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

[Title omitted]

OBJECTIONS TO MOTION FOR WRIT OF CERTIORARI FOR DIMINU-
TION OF THE RECORD—Filed November 21, 1938

To the Honorable Judges of the Above Entitled Court:

Comes now the appellants and object to the motion of appellees for diminution of the record, on the grounds and for the reasons:

1. That the appellees have already been allowed to file a supplemental transcript of the record. Equity Rule 75 (a) provides that the appellees shall have ten days in which to serve and file a designation of additional portions of the record proceedings and evidence to be included.

2. That the request to include Paragraphs I to XXI of the order of the Conciliation Commissioner, dated August 8, 1936, purposely omitted therefrom copy of the foreclosure decree rendered by George R. Bagley, Judge of the Circuit Court of the State of Oregon for Washington County. This decree shows an entry of a deficiency judgment; it shows that the pledge by the appellant Martin J. Bernards of Orenco City bonds was and is a valid pledge thereof, but does not show any documentary evidence in support of this [fol. 245] holding; this decree further shows dissolution of a restraining order which Judge Bagley had wrongfully and unlawfully entered on May 6, 1934.

3. Equity 75 (b) provides that if anything material to either party is omitted upon a proper suggestion the omission may be corrected. That the matters contained in said Paragraphs I to XXI of the order of the Conciliation Commissioner dated August 8, 1936, relate principally and particularly to the good faith of the petitioners in making their

offer of compromise while under the debtor proceedings, and is immaterial to either party at this time.

Appellants filed a petition on June 29, 1936, in the Federal Court at Portland, Oregon, which petition asked the Court for an extension of the period of redemption as provided by the new Frazier Lemke Act, and also asked for an order restraining the Sheriff of Washington County from the delivery of a deed. This was heard by Federal Judge James Alger Fee on or about July 2, 1936. Judge Fee in an oral opinion from the bench denied the petition on the ground that he did not have jurisdiction, and for the further reason that the Sheriff was already restrained and had been restrained from the time the President approved the new act. Mr. E. B. Tongue, attorney for the mortgage creditor, M. R. Johnson, requested Judge Fee for the appointment of a trustee. Judge Fee replied: "I do not see how I can give you a trustee, Mr. Tongue, the law does not provide for a [fol. 245a] trustee." Mr. Tongue then raised objections to appellants offer of compromise as not being in good faith. Judge Fee cut him short when he said: "Mr. Tongue, after the farmer files his amended petition it is too late to object to a bad faith proposal." Judge Fee then retired to his chambers, and his bailiff came out and called attorneys E. B. Tongue and Glen R. Jack (who was representing the appellants on that day) back to his chambers. Mr. Jack informed appellants that what happened was as follows: Judge Fee said: "The reason I called you gentlemen into the chambers is because it does not look well for the Court to be arguing with attorneys from the bench. I have now made up my mind about the Frazier Lemke Act. I have crossed the bridge and I am not going to turn back. I may be a stubborn darned fool and then again I may not be. I am holding the Frazier Lemke Act constitutional. Bernards is a farmer; his petition is in order; he is entitled to the benefits of the Act. The proper thing in this case is an order putting the mortgage holder out of there, but I haven't jurisdiction; jurisdiction in the first instance rests with the Conciliation Commissioner, but if he does not act, or if he refuses to act, then I will act."

On July 15, 1936, appellants filed their petition with the Conciliation Commissioner in Washington County, asking him for an order removing the mortgage creditors, M. R.

Johnson, The United States National Bank of Portland and Catherine Collins, off the farm, and for an accounting of the crops that they had taken. Appellees filed an answer to [fol. 246] the petition on July 24, 1936, in which, among other things, they alleged that appellants offer of compromise made during the debtor proceedings was in bad faith. Appellants filed a reply on the morning of August 8, which denied everything in appellees' answering petition which did not conform with appellants original position of July 15th, but appellants set up no particular defense to the allegation of bad faith, for the reason that Judge Fee in the oral order from the bench had held that after a farmer filed his amended petition it is too late to object to a bad faith proposal. This oral order of Judge Fee has the support of the U. S. Supreme Court in *Wright v. Vinton Branch of Mountain Trust Bank*, 57 Sup. Ct. Rep., p. 562, footnote 6, where the court said: "It must be assumed that the situation of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition at the outset."

Had it been in order and necessary these appellants would have set up an adequate and complete defense to the allegations. But the matter of good faith was immaterial then and it is immaterial now. Appellants believe that these additional portions of the record are now at this late date called for to prejudice the Court as to the merits of Appellants' case, because the Appellants have no defense set up in the record, and therefore appellees' motion should be disallowed.

Dated at Portland, Oregon this 17th day of November, 1938.

Martin J. Bernards, Lena Bernards, Appellants.

[fol. 247] *Duly sworn to by Martin J. Bernards. Jurat omitted in printing.*

[fol. 248] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORDER OF SUBMISSION—February 21, 1939

Ordered motion of appellees for writ of certiorari for diminution of record presented by Mr. A. D. Platt, counsel

for appellees, and good cause therefor appearing, granted, and that the certified copy of documents attached to said motion be filed as a part of the transcript of record herein.

Further Ordered appeal argued by Mr. Martin J. Bernards, in propriam personam, and by Mr. A. D. Platt, counsel for appellees, and submitted to the court for consideration and decision.

[fol. 249] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

ORDER FOR SUPPLEMENTAL TRANSCRIPT—Filed February 28,
1939

This is an appeal, in forma pauperis, from two orders of the District Court made and entered on May 10, 1938, in the matter of Martin J. Bernards and Lena Bernards, bankrupts, No. B-19268. One of the orders appealed from is labeled "Order and Decree." It recites that this matter came on to be heard upon the motion of Catherine H. Collins and others for an order and decree based upon findings of fact and conclusions of law theretofore made and filed. The findings and conclusions purport to have been made after hearing a petition of the bankrupts filed January 15, 1937, answers thereto filed by Catherine H. Collins and others, and the bankrupts' reply to said answers. The so- [fol. 250] called order and decree grants the motion of Catherine H. Collins and others, and dismisses the bankrupts' petition of January 15, 1937.

The transcript filed here does not include the petition, the answers or the motion above referred to. These portions of the record are essential to a determination of the questions attempted to be raised on this appeal. We assume they were omitted from the transcript by accident or error.

Therefore, it is hereby ordered that these omissions be corrected by supplemental transcript, as provided in Equity Rule 76; that the petition, the answers and the motion above referred to be included in such supplemental transcript; and that appellant shall file, with and in addition to the

original of such supplemental transcript, three legible copies thereof.

(Signed) William Denman, United States Circuit Judge. (Signed) Clifton Mathews, United States Circuit Judge. (Signed) Healy, C. J., United States Circuit Judge.

[File endorsement omitted.]

[fol. 251] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORD-
ING OF DECREE—May 2, 1939

By direction of the Court, Ordered that the typewritten opinion this day rendered by this court in this cause be forthwith filed by the clerk, and that a decree be forthwith filed in said cause and entered in the minutes of this court in accordance with the opinion rendered therein.

[fol. 252] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 8855

MARTIN J. BERNARDS and LENA BERNARDS, Appellants,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE UNITED STATES
NATIONAL BANK OF PORTLAND and Joseph M. Loomis,
Trustee, Appellees

Appeal from the District Court of the United States for the
District of Oregon

Before Denman, Mathews and Healy, Circuit Judges

OPINION—Filed May 2, 1939

MATHEWS, Circuit Judge:

This appeal is from two orders, both entered on May 10, 1938, in a proceeding under § 75 of the Bankruptcy Act

(11 U. S. C. A. § 203). The principal question is whether appellants, Martin J. Bernards and Lena Bernards (husband and wife), are entitled to possession of the 16 parcels of land hereinafter described.

Appellants commenced this proceeding on August 10, 1934, by filing a petition which stated that they derived their entire income from farming operations; that said operations occurred in Washington County, Oregon; that appellants were unable to meet their debts as they matured; that they desired to effect a composition or extension under § 75 of the Bankruptcy Act; and that the schedules annexed to the petition contained a full and true statement of their debts and an accurate inventory of their property, real and personal. The petition prayed that it be approved by the court, and that proceedings be had in accordance with § 75.

The property listed in appellants' schedules included 16 parcels of land, numbered 1 to 16, inclusive, in Washington [fol. 253] County, Oregon. Long prior to the filing of appellants' petition, parcel 15 had been mortgaged to appellee Catherine H. Collins; all the parcels, including parcel 15, had been mortgaged to appellee M. R. Johnson;¹ the Johnson mortgage, or some interest therein, had been assigned to appellee United States National Bank of Portland (hereafter called the bank); the debts secured by the mortgages had fallen due and were unpaid; suits to foreclose the mortgages had been commenced in a State court of Oregon, and a decree foreclosing the Johnson mortgage had been obtained by Johnson and the bank. Appellee Collins' foreclosure suit was still pending when the petition was filed.

The bankruptcy court, on August 10, 1934, approved the petition and referred the case to a conciliation commissioner. On December 19, 1934, appellants filed an amended petition, stating that they had failed to obtain the acceptance of a majority in number and amount of all creditors whose claims were affected by their composition or extension proposals, and asking to be adjudged bankrupts, pursuant to subsection (s) of § 75.² Thereupon, on December 19, 1934, appellants were so adjudged, and on December 20, 1934, the case was referred to a referee in bankruptcy.

² Frazier-Lemke Act of June 28, 1934, c. 869, 48 Stat. 1299.

¹ As to parcel 15, the Johnson mortgage was subsequent and inferior to the Collins mortgage.

On May 27, 1935, the Supreme Court, in *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, held that subsection (s), as it then existed, was unconstitutional. Thereafter, on June 29, 1935, pursuant to the foreclosure decree previously mentioned, parcels 1 to 16, inclusive, were sold by the sheriff and purchased by Johnson and the bank.³ Collins obtained a foreclosure decree on July 9, 1935, and pursuant thereto, parcel 15 was sold by the sheriff and purchased by Collins on August 26, 1935. The sale to Johnson and the bank was confirmed on July 20, 1935. The sale to Collins was confirmed on September 16, 1935. Actual possession of the purchased property was obtained by the purchasers on February 1, 1936, and was at all times thereafter retained by them. The time within which appellant might have redeemed the property expired on June 29, 1936.⁴ There was no redemption. The sheriff made and delivered his deed to Johnson and the bank on July 1, 1936, and to Collins on September 10, 1936.

[fol. 254] On August 28, 1935, after both foreclosure sales had been made, subsection (s) was amended.⁵ As amended, it was held constitutional. *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U. S. 440. It provided:

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal * * * may amend his petition * * * asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being

³ Subject, as to parcel 15, to the prior rights of appellee Collins.

⁴ Oregon Code, 1930, § 3-505.

⁵ Frazier-Lemke Act of August 28, 1935, c. 792, 49 Stat. 942, 943.

made, the referee * * * shall designate and appoint appraisers * * *. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value * * *.

“(1) After the value of the debtor’s property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions * * * and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor’s property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

“(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession. * * *

“(3) * * * If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

“(4) The conciliation commissioner * * * shall continue to act, and act as referee, when the farmer debtor amends his petition * * * asking to be adjudged bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of * * *.

“(5) This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases; and all cases that have been dismissed * * * because of the Supreme Court decision holding the former subsection (s) unconstitutional shall be promptly reinstated * * *.”

This case had not been dismissed, but was still pending when subsection (s) was amended.

On September 30, 1935, the order of reference dated December 20, 1934, was vacated, and the case was again referred to a conciliation commissioner, who thereafter acted as referee, pursuant to paragraph (4), *supra*.

On July 15, 1936, after the period within which they might have redeemed the above described land had expired, appellants petitioned the commissioner for an order granting them immediate possession, control and management thereof. On August 8, 1936, the commissioner denied the petition and, pursuant to paragraph (3), *supra*, ordered the appointment of a trustee. Accordingly, at a meeting of appellants' creditors on August 29, 1936, appellee Joseph M. Loomis was elected by the creditors and appointed by the [fol. 256] commissioner as trustee in bankruptcy and, on September 3, 1936, gave bond and qualified as such trustee. The commissioner's orders appointing Loomis as trustee and approving his bond were reviewed and, on December 14, 1936, were affirmed by the court. The court's order of December 14, 1936, was not appealed from. The time within which such an appeal might have been taken expired on January 13, 1937. Bankruptcy Act, § 24(c), as amended May 27, 1926 (44 Stat. 665).^a

On January 4, 1937, appellants petitioned the commissioner to remove the trustee and to put appellants “into immediate possession of the whole of their estate.” On January 11, 1937, the commissioner dismissed that petition, on the ground that the issues which it sought to raise had theretofore been determined adversely to appellants.

On January 15, 1937, appellants petitioned the court to reverse the commissioner's orders of August 8, 1936, August 29, 1936, September 3, 1936, and January 11, 1937. Answering the petition, appellees prayed that it be dis-

^a With the amendment of June 22, 1938 (52 Stat. 855), we are not here concerned.

missed; Collins prayed that her title to parcel 15 be quieted; Johnson and the bank prayed that their title to parcel 16 and parcels 1 to 14, inclusive, be quieted; the trustee prayed that acts theretofore done by him be approved, and that he be directed to pay the expenses of administering the bankrupt estate, and to distribute the money then remaining in his hands to creditors whose claims had been presented and allowed.

On April 13, 1938, appellants filed a reply to appellees' answers and filed a motion "to vacate and set aside all orders of [the] court, and of all the Referees and Conciliation Commissioners where it was sought to set aside or delay the carrying out any of the provisions of the Bankrupt Act particularly the provisions of section 75," meaning, evidently, the orders of August 8, 1936, August 29, 1936, September 3, 1936, December 14, 1936, and January 11, 1937.

On May 10, 1938, the court, after hearing the case, made and filed its findings of fact and thereupon entered (1) an [Vol. 257] order⁷ dismissing appellants' petition of January 15, 1937, and granting appellees the relief prayed for in their answers, and (2) an order denying appellants' motion filed April 13, 1938. This appeal followed.

The orders appealed from are based on findings. The evidence on which the findings are based is not in the record. Therefore, we must and do accept the findings as correct. *Bank of Eureka v. Partington*, 9 Cir., 91 F. 2d 587, 590; *Bakersfield Abstract Co. v. Buckley*, 9 Cir., 100 F. 2d 530, 531.

The court found that the land in question was mortgaged, that the mortgages were foreclosed, and that foreclosure sales were made, as stated above, and that there had been no redemption. Consequently, since June 29, 1936, appellants have had no right, title or interest in or to the land, nor has the bankruptcy court had any jurisdiction thereof. Therefore, the court could not properly have granted appellants' petition of January 15, 1937, or their motion of April 13, 1938.

Appellants assume, erroneously, that the foreclosure sales were prohibited by subsection (o) of § 75, 11 U. S.

⁷ This order was labeled "order and decree." It was, in effect, a decree in equity as well as an order in bankruptcy.

C. A. § 203(o). The prohibition in subsection (o) applies only to a period "prior to the confirmation or other disposition of the composition or extension proposal," which period expires when the debtor is adjudged a bankrupt. *Hardt v. Kirkpatrick*, 9 Cir., 91 F. 2d 875, 878. In this case, it expired on December 19, 1934. The "stay" provided for in subsection (s), as amended, is not an automatic stay, but is a judicial stay,⁸ to be granted only upon compliance with specified conditions. Appellants never obtained, and—upon the facts found—were never entitled to, any such stay.

The court found that appellants "have made no attempt to comply with the conditions required of them by the 'Frazier-Lemke' amendment to the Acts of Congress in relation to bankruptcy, necessary to be complied with by them in order to obtain the right and privilege of a three years' stay of enforcement of the obligations owned and held by their creditors and possession of the real and personal property described in the schedules;" that appellants, "at the time of the filing of [their] petition, on December 19th, 1934, and at all times thereafter, have been in truth and in fact beyond all hope of financial rehabilitation;" and [fol. 258] that "the only effect of further proceedings and delays on their behalf in this bankruptcy proceeding will be to postpone the inevitable liquidation of their financial affairs without benefit to them and resulting in great hardship to the creditor."

Thus, in effect, the court found (1) that appellants did not comply with the provisions of § 75, and (2) that they were unable to refinance themselves within three years, or at all. Either of these facts would have warranted denial of the relief sought by appellants. Bankruptcy Act, § 75(s)(3), 11 U. S. C. A. § 203(s)(3); *Wright v. Vinton Branch of Mountain Trust Bank*, supra, p. 462; *Pearce v. Collier*, 3 Cir., 92 F. 2d 237, 238; *Donald v. San Antonio Joint Stock Land Bank*, 5 Cir., 100 F. 2d 312, 314.

Orders affirmed.

Healy, Circuit Judge, concurs in the result.

[File endorsement omitted.]

⁸ *Hardt v. Kirkpatrick*, supra.

[fol. 259] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 8855

MARTIN J. BERNARDS and LENA BERNARDS, Appellants,
vs.

M. R. JOHNSON et al., Appellees

DECREE—Filed May 2, 1939

Appeal from the District Court of the United States for
the District of Oregon

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Oregon, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the orders of the said District Court in this cause be, and hereby are, affirmed with costs in favor of the appellees and against the appellants.

It Is Further Ordered, Adjudged, and Decreed by this Court, that the appellees recover against the appellants for their costs herein expended, and have execution therefor.

[File endorsement omitted.]

[fol. 260] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Martin J. Bernards and Lena Bernards, Appellants, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including July 15, 1939; and in the event the petition for a writ of certiorari to be made by the Appellants herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate

of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

William Denman, United States Circuit Judge.

Dated: San Francisco, California, May 25, 1939.

[fols. 261-264] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 265] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

MOTION TO RECALL AND WITHHOLD MANDATE—Filed
November 4, 1939

Come now Martin J. Bernards and Lena Bernards, Petitioners herein, and respectfully move the Court that the mandate of this Court lately forwarded to the Clerk of the District Court of the United States for the District of Oregon in the above entitled cause be recalled and held, pending the decision of the Supreme Court of the United States in the case of John Hancock Mutual Life Insurance Company vs. Bartels, Case No. 33, October Term, 1939, set for argument on November 8, 1939, for the following reason and upon the following ground:

1. That said cause now pending in the Supreme Court presents for the determination of said Court issues of law which are directly involved in and controlling over the instant case and which, as Petitioners believe, will be determined in such a manner as to require setting aside the aforesaid mandate and granting Petitioners the relief sought. The issues referred to are whether, under Sec. 75 of the Bankruptcy Act, after adjudication and prior to the entry of a rental stay order, the District Court may find [fol. 266] the bankrupts beyond rehabilitation, whether, after adjudication and prior to the entry of a rental stay order, the creditors may proceed in the State Courts, and whether the provisions of Section 75 of the Bankruptcy Act leading up to the rental stay order are mandatory or discretionary with the District Court.

Dated this 1st day of November, 1939.

(Signed) Martin J. Bernards of Petitioners. A True
Copy: Martin J. Bernards.

[File endorsement omitted.]

[fol. 267] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

ORDER DENYING MOTION TO RECALL MANDATE—November 6,
1939

Upon consideration of the motion of appellants, filed November 4, 1939, to recall mandate of this court issued herein on October 28, 1939, after denial of petition for writ of certiorari by the Supreme Court of the United States, and to withhold such mandate, etc. and by direction of the Court, Ordered said motion be, and hereby is denied.

[fol. 268] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

[Title omitted]

MOTION AND PETITION FOR RECALL AND CORRECTION, AMENDMENT, REVISION AND/OR OPENING AND VACATING MANDATE AND JUDGMENT ENTERED THEREON—Filed January 2, 1940

Come now Appellants and respectfully move and petition the Court for the Recall and Correction, Amendment, Revision and/or opening and vacating the Mandate herein, and the Judgment of the District Court of the United States for the District of Oregon entered thereon, upon the following ground and for the following reason:

I

That from the decision of the Supreme Court of the United States in the case of John Hancock Mutual Life Insurance Company vs. Benno Bartels, United States Supreme Court Reporter L. Ed. Advance Opinions, Vol. 84, No. 3, p. 154, decided December 4, 1939, it plainly appears that the decision of this Court in the above-entitled cause rendered May 2, 1939, was and is palpably erroneous in determining that petitioners were not entitled to the relief prayed for, for reasons set forth in the Points, Authorities [fol. 269] and Argument appended hereto, and the sound discretion of this court requires that the mandate and

judgment based upon said decision of May 2, 1939, be vacated and corrected to allow petitioners the relief demanded.

(Signed) Martin J. Bernards, Lena Bernards, Petitioners in pro. per.

Notice

To Appellees M. R. Johnson and the United States National Bank of Portland (Oregon) and Platt & Black and A. D. Platt, their Attorneys, Appellee Catherine Collins and Williams L. Brewster, Her Attorney, and Appellee Joseph M. Loomis, Trustee, and Bagley & Hare and George R. Bagley, His Attorneys:

Please take notice that the within Motion is hereby noticed for hearing upon January 8th, 1940, before the above-entitled Court. Appellants intend to rely upon the Points, Authorities and Argument appended to said Motion as therein presented, and to submit the same without oral argument.

(Signed) Martin J. Bernards, Lena Bernards, Appellants.

[File endorsement omitted.]

[fol. 270] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

[Title omitted]

MOTION OF APPELLEES TO DISMISS APPELLANTS' MOTION AND PETITION FOR RECALL AND CORRECTION, AMENDMENT, REVISION AND/OR OPENING AND VACATING MANDATE AND JUDGMENT ENTERED THEREON—Filed January 12, 1940

Come now the appellees herein and respectfully move the court that that certain motion and petition of appellants entitled "Motion and petition for recall and correction, amendment, revision and/or opening and vacating mandate and judgment entered thereon" be dismissed and quashed upon the ground that this court is without jurisdiction to recall its mandate in the above entitled cause or to revoke or modify its final decree herein, for the reason that long

prior to the filing of said motion and petition by appellants the term at which said final decree was entered had expired and the mandate of this court had issued and had been duly entered by the court below.

Platt & Black, H. G. Platt, A. D. Platt, Geo. Black, Jr., Wm. L. Brewster, Attorneys for Appellees.

[fol. 271] Notice to Appellants, Martin J. Bernards and
Lena Bernards

Please take notice that the within motion to dismiss is hereby noticed for hearing upon January 16, 1940, before the above entitled court, or at such later time as the court may appoint. Appellees intend to rely upon the points and authorities appended to said motion and the memorandum served upon you and filed herewith, and to submit the same without oral argument.

Platt & Black, Wm. L. Brewster, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 272] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

ORDER SUBMITTING MOTION FOR RECALL OF MANDATE—January 18, 1940

Ordered motion of appellants for recall of the mandate of this Court heretofore issued on October 28, 1939, submitted to the court for consideration and decision on papers filed.

[fol. 273] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

ORDER DENYING PETITION FOR RECALL AND CORRECTION, AMENDMENT, REVISION AND/OR OPENING AND VACATING MANDATE AND JUDGMENT ENTERED THEREON—March 22, 1940

Upon consideration of the petition of appellants, filed January 2, 1940, for recall and correction, amendment,

revision and/or opening and vacating mandate and judgment entered thereon and motion of appellees to dismiss appellants' motion, etc., filed January 12, 1940, and by direction of the Court, Ordered said petition of appellants be, and hereby is denied.

[fol. 274] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 275] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 29, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: In forma pauperis Enter petitioners pro se. File No. 44,314. U. S. Circuit Court of Appeals, Ninth Circuit, Term No. 907. Martin J. Bernards and Lena Bernards, Petitioners, vs. M. R. Johnson, Catherine Collins, The United States National Bank of Portland, et al. Petition for a writ of certiorari and exhibit thereto. Filed April 12, 1940. Term No. 907 O. T. 1939.

FILE COPY

Office - Supreme Court, U. S.

FILED

APR 12 1940

CHARLES ELMORE GROPLEY
CLERK

SUPREME COURT OF THE UNITED

STATES

OCTOBER TERM, 1940

No. 52 2

MARTIN J. BERNARDS AND LENA BERNARDS,
Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF PORT-
LAND AND JOSEPH H. LOOMIS, TRUSTEE.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.

✓ MARTIN J. BERNARDS,
LENA BERNARDS,

Pro se.



INDEX.

SUBJECT INDEX.

	Page
Petition for writ of certiorari	1
Caption	1
Statement of facts	2
Questions presented	9
Statutes involved	10
Reasons for granting of petition	10
Prayer	13
Brief in support of petition	15
Caption	15
Opinion below	15
Jurisdiction	16
Statement of facts	16
Summary of argument	17
Argument—Point I	18
On jurisdiction	18
Argument—Point II	19
Timely application	19
Argument—Point III	21
Merits	22
Trustee order appealed	28
Appendix	30
Statutes involved (Sec. 75, Bankruptcy Act, 11	
U. S. C. A., Sec. 203)	30

CASES CITED.

<i>Bronson v. Schulten</i> , 104 U. S. 410, 26 L. Ed. 797	11, 19
<i>Hardt v. Kirkpatrick</i> , 91 F. (2d) 875	27
<i>In re Glory Bottling Co. of New York, Inc.</i> , 283 Fed.	
110	21
<i>John Hancock Mutual Life Ins. Co. v. Bartels</i> , 308	
U. S. 180, 60 Sup. Ct. 221	8, 12
<i>Kalb v. Feuerstein</i> , 60 Sup. Ct. 343	8, 12
<i>Louisville Joint Stock Land Bank v. Radford</i> , 295	
U. S. 555	3
<i>Miocene Ditch Co. v. Campion</i> , 197 Fed. 497	19

	Page
<i>Sandusky v. National Bank</i> , 23 Wall. 289, 33 L. Ed. 155	20
<i>Staude Mfg. Co. v. Labombarde</i> , 247 Fed. 879	19
<i>United States v. Benz</i> , 282 U. S. 304, 51 Sup. Ct. 113	18
<i>Utah P. & P. Co. v. U. S.</i> , 242 Fed. 924	20
<i>Van Derveer v. Phillips and Buttorf</i> , 112 Fed. 966	21
<i>Wayne United Gas Co. v. Owens Illinois Glass Co. et al.</i> , 300 U. S. 131, 57 Sup. Ct. 383	10, 18
<i>Wright v. Vinton</i> , 300 U. S. 440	25

OTHER AUTHORITIES CITED.

5 C. J. S. 1996	20
Foster Federal Practice	20

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 54

MARTIN J. BERNARDS AND LENA BERNARDS,
Petitioners,
vs.

M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF PORT-
LAND AND JOSEPH H. LOOMIS, TRUSTEE.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Martin J. Bernards and Lena Bernards, the petitioners herein, appearing *pro se* under an application to proceed herein *in forma pauperis*, pray that a writ of certiorari issue to review the final order of the United States Circuit Court of Appeals for the Ninth Circuit, entered herein on March 22, 1940, denying petitioners' Motion and Petition to recall the mandate and to vacate and correct the judgment entered pursuant to the decision of the United States Circuit Court of Appeals for the Ninth Circuit rendered on May 2, 1939. This decision is reported in 103 F. (2d) 567.

Statement of Facts.

On August 10, 1934, petitioners commenced this proceeding in the District Court of the United States for the District of Oregon by filing a petition stating that they derived their entire income from farming operations conducted in Washington County, Oregon; that petitioners were unable to meet their debts as they matured; that they desired to effect a composition or extension under Section 75 of the Bankruptcy Act (11 U. S. C. A. Sec. 203); and that the schedules annexed to the petition contained a full and true statement of their debts and an accurate inventory of their property. The petition prayed that it be approved by the court, and that proceedings be had in accordance with said Section 75 (R. 1-2).

Included in the schedules were 16 parcels of real property in Washington County, Oregon, one of which was mortgaged to the respondent Collins and all of which were mortgaged to the respondent M. R. Johnson. The Johnson mortgage or some interest therein had been assigned to the respondent The United States National Bank. The debts secured by the mortgages were past due and suits to foreclose had been commenced in the State court. A foreclosure decree had been entered on the Johnson mortgage but suit was still pending upon the Collins mortgage when the petition was filed (R. 1-2).

On the date of filing the petition was approved by the court as filed in good faith and the cause was referred to a conciliation commissioner (R. 6). On December 19, 1934, petitioners filed an amended petition stating that they had failed to obtain the acceptance of a majority in number and amount of all of the creditors whose claims were affected by the composition or extension proposals, and asking to be adjudged bankrupts, under the provisions of subsection (s) of Section 75 of the Bankruptcy Act, and to have the benefits of said subsection (R. 9-13) On said date, De-

cember 19, 1934, an order of adjudication was entered under the provisions of said paragraph (s) and on December 20, 1934, the case was referred to a referee in bankruptcy (R. 14).

On the date of the first hearing before the referee, to wit, February 8, 1935, a petition was addressed to the judges of the court and to the referee asking for the appointment of appraisers and retention of possession of the property by the petitioners (R. 36-37). Pursuant thereto appraisers were appointed by the referee, but on May 27, 1935, before an appraisal was made, subsection (s) of said Section 75 was held unconstitutional by the Supreme Court. (*Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555.) The proceedings herein were not dismissed but remained pending.

On June 29, 1935, a purported judicial sale of the real property was held under the foreclosure decree obtained by respondent Johnson in the State court and the property was bid in by respondents Johnson and The United States National Bank. On July 9, 1935, respondent Collins obtained a foreclosure decree in the State court and pursuant thereto a purported judicial sale was held on August 26, 1935, whereby the property mortgaged to respondent Collins was sold to said respondent. These sales were confirmed on July 20, 1935, and September 16, 1935, respectively.

On August 28, 1935, subsection (s) of Section 75 was amended. Frazier-Lemke Act of August 28, 1935, C. 792, 49 Stat. 942, 943. On September 30, 1934, petitioners filed their petition in the District Court reciting the proceedings theretofore had and reciting that the proceedings and documents in the possession of the referee should be transferred to the court to be referred to the conciliation commissioner for Washington County and asking for an order directing the referee to transfer to the court all documents and

records together with a report of all proceedings therein (R. 16-17).

On said 30th day of September, 1935, an order was made and entered by the court recalling the order of reference to the referee and directing the referee to transmit to the court all records, documents and proceedings in his possession together with a report of all proceedings had before him and further ordering that the proceedings be referred to the conciliation commissioner for Washington County (R. 17-18). Accordingly the referee transmitted to the court the documents and record of the proceedings including the amended petition of December 19, 1934, and the petition of February 8, 1935, for the benefits of the act including the appointment of appraisers, appraisal, and retention of possession by petitioners (R. 36-37). This latter petition was marked filed October 10, 1935, by the clerk of the court and forwarded to the conciliation commissioner together with the other documents. On October 15, 1935, an order was entered by the court referring the cause to the Conciliation Commissioner "to take such further proceedings therein as are required by said acts" and directing the bankrupts to attend before the Conciliation Commissioner and to submit to his orders or the orders of the court relating to the bankruptcy (R. 19).

No action was taken by the conciliation commissioner other than to hold the first hearing. On February 1, 1936, the respondents Collins, Johnson and The United States National Bank obtained possession of the mortgaged property by means of a writ of assistance issued out of the State court. Sheriff's deeds were delivered to respondents Johnson and Collins on July 1st, 1936, and September 10, 1936, respectively. On July 15, 1936, petitioners petitioned the conciliation commissioner for an order removing the mortgages from the premises and requiring them to account to the bankrupts for the crops (R. 19-21). On August 8,

1936, the commissioner denied the petition and ordered the appointment of a trustee (R. 49-53). On August 29, 1936, at a meeting of the creditors, respondent Loomis was elected by a minority of creditors and appointed by the commissioner as trustee in bankruptcy and qualified on September 3, 1936 (R. 54). Creditors holding majority in amount of claims refused to approve a trustee as shown by affidavits attached to petition (R. 25-29). The commissioner's orders appointing the trustee and approving his bond were reviewed and on December 15, 1936, were affirmed by the court (R. 24).

On January 4, 1937, petitioners petitioned the commissioner to remove the trustee and put petitioners into immediate possession of the whole of their estate and to proceed with appraisal of property (R. 25-27). At a hearing on January 11, 1937, the commissioner dismissed that petition (R. 30-31). At said hearing counsel for petitioners asked that Conciliation Commissioner whether or not in the proceeding had before him, he proceeded under the Frazier-Lemke Act of August 28, 1935, and the Commissioner replied that he had. The Commissioner was then asked whether he had appointed appraisers under said act and if so, whether an appraisal had been made, and the commissioner replied that an appraisal had been made and produced from the files a document of that tenor and effect (R. 81-82). The appraisals made (R. 58-61), and (R. 63-63) do not include personal property listed in petitioners schedules, the value of which is more than two-thirds of the total value of personal property (R. 39-47). No objection was ever made to the partial appraisal for the reason that the trustee appointed by the Commissioner (R. 54) and order of the District Judges confirming trustee (R. 24) took the property wrongfully from the possession of petitioners. On January 15, 1937, petitioners petitioned the court to reverse the commissioner's orders of August 8,

1936, and August 29, 1936, September 3, 1936, and January 11, 1937 (R. 77-87). In answer to the petition respondent Collins prayed that her title to the mortgaged property be quieted, respondent Johnson and The United States National Bank prayed that their title to the mortgaged property be quieted, and the trustee prayed that the acts done by him be approved and that he be directed to complete the administration of the bankrupts' estate by payment of expenses and distribution to creditors (R. 81-91, 91-100).

On January 29, 1937, petitioners filed a petition with the Conciliation Commissioner asking a review of the Conciliation Commissioner's order of January 11, 1937, which order denied petitioners' request to remove trustee (R. 33-34).

On April 13, 1938, petitioners filed a motion to vacate and set aside all orders of the court and of the referee and conciliation commissioner where it was sought to set aside or delay the carrying out of the provisions of section 75 of the Bankruptcy Act and that the cause be promptly reinstated without any additional filing fees or charges. This motion was based upon contentions as follows:

1. That the referee in bankruptcy and the conciliation commissioners had no jurisdiction to pass on the adjudication of bankrupts or the qualifications of bankrupts to come under Section 75 of the Bankruptcy Act.
2. That the referee in bankruptcy and conciliation commissioners had no jurisdiction to proceed until they had complied with the mandatory provision of the Bankruptcy Act and particularly the provisions and the amendments of Section 75 of the Bankruptcy Act.
3. That under the amendments of Section 75 of the Bankruptcy Act approved March 4, 1938, where the Conciliation Commissioner had improperly held new subsection (s) unconstitutional as applied to the land, petitioners were entitled to have the cause promptly reinstated without additional filing fees or charges.

4. That after adjudication no further affirmative action by the petitioners is necessary until the referee and conciliation commissioners had complied with the mandatory provisions of the Bankruptcy Act and particularly Section 75 (R. 34-35).

On May 10, 1938 the court entered an order confirming order of Conciliation Commissioner denying petitioners' petition of January 4th, 1937, which petition asked for the removal of the trustee (R. 39).

On May 10, 1938, the court made and entered findings of fact and ordered that petitioners' petition of January 15, 1937, be dismissed, granted the respondents the relief prayed for in their answer, and ordered that petitioners' motion of April 13, 1938, be denied (R. 37-39). In the findings upon which these orders were based the court found that the land was mortgaged, that foreclosure sales had been held, that there had been no redemption, that petitioners had made no attempt to comply with the conditions required of them in order to obtain the right and privilege of a three years' stay of enforcement of their obligations and the right to possession of their property; that at the time of filing their petition on December 19, 1934, and at all times thereafter, petitioners have been beyond all hope of financial rehabilitation and that the only effect of further proceedings on petitioners' behalf in the bankruptcy would be to postpone the inevitable liquidation of petitioners' financial affairs without benefit to them and resulting in great hardship to the creditors (R. 64-74).

No oral testimony was introduced in the District Court.

Thereafter petitioners prosecuted an appeal under section 24-B of the Bankruptcy Act to the United States Circuit Court of Appeals for the Ninth Circuit. On May 2, 1939, the Circuit Court of Appeals rendered its opinion and affirmed the orders entered in the District Court.

Thereafter petitioners made timely application to the Supreme Court of the United States for a writ of certiorari to review the judgment of the Circuit Court of Appeals aforesaid, and according to law the issuance of the mandate was stayed pending the disposition of the matter in the Supreme Court (R. 158).

On October 23, 1939, the petition for certiorari was denied without opinion. Immediately upon receipt of notice thereof, petitioners sought to obtain an Order withholding the mandate pending the anticipated decisions of the Supreme Court interpreting section 75 of the Bankruptcy Act. Upon information that the mandate had already issued, petitioners moved in the District Court to withhold the entry thereof and moved simultaneously in the Circuit Court of Appeals to have the same recalled and held (R. 159). This application was instantly denied (R. 160).

On December 4, 1939, Supreme Court handed down its decision in the case of *John Hancock Mutual Life Insurance Company v. Bartels*, 60 Supreme Court Rept. 221, 308 U. S. 180. As is hereinafter more fully developed, petitioners consider it to be controlling in the instant case and to require the correction of the decision of the Circuit Court of Appeals of May 2, 1939. Accordingly petitioners promptly filed in the Circuit Court of Appeals their motion and petition to recall the mandate and correct the judgment, upon the authority of the *Bartels* case (R. 160). On January 2, 1940, the Supreme Court rendered its decision in the case of *Kalb v. Feuerstein*, 60 Supreme Court Rept. 343). Petitioners believe the propositions decided in the *Kalb* case are absolutely determinative of the instant case and left the decision of the Circuit Court of Appeals of May 2, 1939, absolutely without foundation.

Accordingly the aforesaid Motion and Petition was supplemented to call the attention of the Circuit Court of Appeals to this decision. The matter then remained pending

in the Circuit Court of Appeals without action until March 22, 1940, when the Motion and Petition were denied without reason therefor being assigned (R. 162).

Reasons Relied Upon for the Issuance of the Writ.

Questions Presented.

I.

Does the exercise of sound discretion require a Circuit Court of Appeals to recall its mandate upon an appeal in bankruptcy and correct the judgment entered thereon where within 50 days after the entry of the mandate and during the term at which it was entered application for recall and correction was made to the Circuit Court of Appeals upon the basis of intervening decisions of the United States Supreme Court establishing error in the original decision upon which the mandate was based?

II.

After the filing of a petition for composition and extension under Section 75 of the Bankruptcy Act as amended, and during the pendency of the proceedings thereby initiated, are proceedings in the State Court automatically stayed?

III.

Where the original petition filed under Section 75 of the Bankruptcy Act is approved as filed in good faith and where an amended petition is filed under subsection (s) of Section 75 and is accepted by the court and an order of reference made, does the Court or Conciliation Commissioner have jurisdiction to deny the farmer debtors the benefits of the Act upon Arbitrary findings that the proposal for composition and extension was not made in good faith and that the farmer-debtors were unable to refinance themselves in three years or at all?

IV.

Assuming that orders appointing and confirming a trustee under Section 75 (s) of the Bankruptcy Act to be not void but voidable, then; where an order of the conciliation commissioner appointing a trustee was reviewed and confirmed on December 15, 1936, and where diligently thereafter on January 4, 1937, and before any intervening rights had accrued, and before the thirty day appeal period had expired, petitioners filed a petition with the conciliation commissioner asking removal of the trustee and its denial timely taken to the District Court for review on January 29, 1937, where it was affirmed on May 10, 1938; have the petitioners lost their right to appeal to the appointment of a trustee?

Statutes Involved.

This cause involves the construction of Section 75 of the Bankruptcy Act, 11 U. S. C. A. Section 203.

Reasons for Granting the Petition.

I.

The United States Circuit Court of Appeals for the Ninth Circuit has herein decided an important question of general law in a manner contrary to the great weight of authority and contrary to the decisions of the United States Supreme Court. This question relates to the general power and jurisdiction of a court over its judgments and orders, and its inherent power to correct error upon timely application. In denying petitioners' motion and petition to recall the mandate and correct the judgment, the Circuit Court of Appeals refused to correct error established by intervening decisions of the United States Supreme Court, as hereinafter shown.

In *Wayne United Gas Co. v. Owens Illinois Glass Co., et al.*, 57 Sup. Ct. Rep. 383, 300 U. S. 131 (1937), the United

States Supreme Court reiterated the rule that courts of law, equity and Bankruptcy may correct their judgments and orders upon timely application.

In *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797, the United States Supreme Court, while denying the relief prayed for, held that the only judgments and decrees over which jurisdiction was lost by the expiration of the term were "final judgments". In the same case it was pointed out that where steps were taken within the term to have the error corrected, such judgments were thereby prevented from becoming final and jurisdiction thereof was not lost by the expiration of the term.

In the instant case the Circuit Court of Appeals for the Ninth Circuit, by denying petitioners' timely motion and petition to recall the mandate and correct the judgment, refused to comply with the requirements of sound discretion and refused to exercise the jurisdiction recognized by the Supreme Court in the cases referred to.

II.

The Circuit Court of Appeals for the Ninth Circuit has herein decided important questions of Federal law in a manner in conflict with the decisions of the Supreme Court. These questions relate to the stay of proceedings in the State courts while proceedings are pending in the Bankruptcy Courts under Section 75 of the Bankruptcy Act, and to the jurisdiction of a District Court to dismiss proceedings under subsection (s) of Section 75 of the Bankruptcy Act on the ground of bad faith, or inability to become financially rehabilitated.

By denying petitioners' motion and petition to recall the mandate and correct the judgment, the Circuit Court of Appeals in effect adhered to its decision of May 2, 1939, upon which the judgment was based. In that decision the Circuit Court of Appeals specifically held that the only stay

provided under subsection (s) of Section 75 of the Bankruptcy Act was the judicial rental stay order therein mentioned, and sanctioned the action of the District Court in denying petitioners the benefits of subsection (s) of Section 75 upon the ground of arbitrary findings of bad faith proposal and inability to become financially rehabilitated.

In *Kalb v. Feuerstein*, 60 Sup. Ct. 343, decided January 2, 1940, the Supreme Court held that the State courts have no jurisdiction to proceed while proceedings under Sec. 75 of the Bankruptcy Act are pending, using the following words:

"No proceedings after the filing of the petition should be instituted, or if instituted prior to filing of the petition, should not be maintained in any court, or otherwise."

In *John Hancock Mutual Life Insurance Company v. Bartels*, Sup. Ct. Rep. Adv. Opinions, L. Ed. Vol. 84, p. 154, 300 U. S. 180, the Supreme Court specifically held that a District Court must follow the mandate of the Statute and cannot arbitrarily dismiss proceedings under subsection (s) of Section 75 on the ground of bad faith proposal or asserted inability to refinance.

The decision of May 2, 1939 rendered by the Circuit Court of Appeals is squarely in conflict with the recent holdings of the Supreme Court referred to, and upon timely application made, sound discretion required the Circuit Court of Appeals to correct its palpable error.

Petitioners are informed that of a large number of petitions for certiorari filed in the Supreme Court during the October, 1939 term to review questions relating to Section 75 of the Bankruptcy Act, only a representative few were allowed. Petitioners cannot believe otherwise than that the Supreme Court intended the decisions in the cases where certiorari was granted to be controlling in the other cases.

If this belief is true, the various Circuit Courts of Appeals, in the interests of justice, should not be permitted to circumvent this intention by arbitrarily adhering to their prior erroneous decisions in the face of timely application to correct the error. Justice to petitioners and those in like position establishes a need for an authoritative ruling by this Court and a decision herein will answer the need for uniformity and certainty requisite to the guidance of the inferior courts before which such questions are now and will ever be raised.

Wherefore, your petitioners, respectfully pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify to this Court, on a designated day, a full and complete transcript of the record of all proceedings of said Circuit Court of Appeals had in said cause, to that end that this cause may be reviewed and determined by this Honorable Court and that said final order of said Circuit Court of Appeals may be reversed, and for such other and further relief as the sound discretion of this Honorable Court deems the extreme emergency of this case requires.

MARTIN J. BERNARDS,

LENA BERNARDS,

Petitioners Pro Se.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 54

MARTIN J. BERNARDS AND LENA BERNARDS,

Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF PORT-
LAND AND JOSEPH H. LOOMIS, TRUSTEE.

**A BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.**

Opinion Below.

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the final order of that court denying petitioners' motion and petition to recall the mandate and correct the judgment issued and entered pursuant to the decision of that court on May 2, 1939, affirming separate orders in bankruptcy of the District Court of the United States for the District of Oregon. These orders of the District Court were not rendered under written opinion, but were based

upon findings and conclusions incorporated in the record. The written opinion of the Circuit Court of Appeals affirming the orders is hereinafter set forth in full. The order denying petitioners' motion and petition to recall the mandate and correct the judgment was rendered without opinion.

Jurisdiction.

Jurisdiction of this cause is based upon 28 U. S. C. A., Section 347, Judicial Code, Sec. 240 (s), as amended by the Act of February 13, 1925. The date of the order to be reviewed is March 22, 1940, and this petition is filed within sixty days from date thereof. The questions presented involve the construction and interpretation of Section 75 (s) of the Bankruptcy Act as amended.

Statements of Facts.

The facts in this cause are as set forth in the accompanying petition for certiorari. We wish, however, to emphasize the following facts:

The original petition for composition or extension was allowed as filed in good faith. The proposals were not accepted by the creditors, but no suggestion of bad faith was made at the time the proposals were rejected. The amended petition was not objected to and was accepted by the District Court and an order of adjudication entered thereon under original subsection (s) of Section 75 of the Bankruptcy Act. This proceeding was not dismissed when original subsection (s) was held invalid, but was pending at the time the purported foreclosure sales were held under decrees in the State courts. The District Court denied the petitioners the benefits of subsection (s) as amended upon the basis of arbitrary findings that the composition and extension proposals were not made in good faith, and that the petitioners were unable to refinance within three years

or at all. Upon appeal from the orders denying petitioners possession of their property and the benefits of subsection (s), the Circuit Court of Appeals for the Ninth Circuit rendered a decision on May 2, 1939, affirming said orders. During the same term of the Circuit Court of Appeals, petitioners took steps to have the decision reviewed on certiorari. Certiorari was denied during the present term of court, whereupon petitioners promptly gave notice of their expectation that the Supreme Court would shortly render controlling decisions, by moving that the mandate be recalled and withheld. This motion was denied instantly, and shortly thereafter the decisions of the Supreme Court in *John Hancock Mutual Life Insurance Company v. Bartels*, *post*, and *Kalb v. Feuerstein*, *post*, were rendered. Petitioners then made prompt application for recall of the mandate and correction of the judgment on the basis of the errors of law established by those decisions. The application was denied and this appeal followed.

Summary of Argument.

Petitioners contend that the decision of the Circuit Court of Appeals of May 2, 1939, was erroneous in law, and that the error was established by the decisions of the Supreme Court in *John Hancock Mutual Life Insurance Company v. Bartels*, *post*, and *Kalb v. Feuerstein*, *post*, which held, contrary to the decision of the Circuit Court of Appeals, that the stay under subsection (s) of Section 75 is automatic rather than judicial, and that after the amended petition is accepted and approved, the benefits of subsection (s) may not be arbitrarily refused on the grounds of a bad faith proposal or inability to refinance. Petitioners further contend that the facts show timely application for correction of the error and that since sound discretion required the correction of the judgment failure to make the correction constitutes an abuse of discretion.

Petitioners accordingly contend that the Circuit Court of Appeals, in failing to recall the mandate and correct the judgment, decided questions of general law contrary to the weight of authority, and contrary to the decisions of the United States Supreme Court, and in so doing adhered to a decision squarely in conflict with the decisions of the United States Supreme Court interpreting the Federal law, to-wit, the Bankruptcy Act.

ARGUMENT.

Since the order sought herein to be reviewed was entered without any written opinion, the basis for the denial of petitioners' application to recall the mandate and correct the judgment is necessarily a matter of conjecture. However, there are only three possible grounds for denying the application, all of which must be assumed to have been resolved against petitioners. These grounds are, first, that the Circuit Court of Appeals had no jurisdiction to make the correction; second, that the application was not timely, or third, that the application lacked merit.

Point I.

First, with respect to jurisdiction, respondents themselves conceded that a court has inherent jurisdiction to correct its judgments and orders upon timely application. The Supreme Court of the United States has often reaffirmed this proposition. In *Wayne United Gas Co. v. Owens Illinois Glass Co.*, 57 Sup. Ct. Rep. 382, 300 U. S. 131; *United States v. Benz*, 51 Sup. Ct. 113, 282 U. S. 304, and many other cases it has been repeatedly held that a court has power and control over its judgments and orders to correct the same upon timely application made.

If the application to the Circuit Court of Appeals was denied for lack of jurisdiction, the order plainly violates a fundamental proposition of general law.

Point II.

Petitioners contend that as a proposition of general law and under the decisions of the United States Supreme Court and the Circuit Court of Appeals, their application to the Circuit Court of Appeals was timely.

While the proposition is often stated that a court retains jurisdiction over its judgments and orders during the term, such a statement is incomplete and must be qualified.

Thus in *Bronsen v. Schulten*, 104 U. S. 410, 26 L. Ed. 797, the Supreme Court, while denying the relief prayed for because of a lapse of 17 years time, pointed out that the only judgments over which jurisdiction is lost by the expiration of the term are "final judgments", and that where steps are taken within the term to correct the error the judgment does not become final.

In the instant case, petitioners, during the term at which the decision was rendered, took steps to have the same reviewed upon certiorari, and the petition therefor was not denied until the present term. It therefore appears that the judgment of the Circuit Court of Appeals could not have become final until the present term, during which the application for recall and correction was made and denied.

The language of many decisions indicates that the time of issuance of the mandate of an appellate court is controlling. In the instant case the mandate was not issued until the present term.

In *Miocene Ditch Co. v. Champion*, 197 Fed. 497 (9th Circuit) this same Circuit Court of Appeals considered the time of issuance of the mandate as determinative, and where the term at which the mandate had issued had expired, held that the application was not timely.

In *Staudt Mfg. Co. v. Labombarde*, 247 Fed. 879 (1st Circ.), the mandate had issued, and, after the expiration of the term, application was made for its recall and correction. Though the mandate had not been entered below, the

petition for recall was denied because the mandate had issued in the previous term. The court there cited *Foster*, Federal Practice, 4th Ed., p. 2149, for the proposition that mandates can be recalled during the term for correction but not afterwards.

In *Utah P. & L. Co. v. U. S.*, 242 Fed. 924, the mandate was recalled after the term, for correction to conform to an intervening Supreme Court decision.

In 5 C. J. S. Sec. 1996, the rule is stated that:

“An appellate court generally has power to recall its mandate, at least during the term at which it was issued.”

In the instant case the facts show that the application was made to the Circuit Court of Appeals during the term at which the judgment became final and during which the mandate issued. No intervening rights have been or can be shown. Since petitioners' application for correction was timely, its denial conflicts with the weight of authority and the decisions of this Court.

Finally, there is authority for the proposition that there are no terms in bankruptcy proceedings, and, if this be accepted, the question of timeliness (aside from *laches* which can have no application here) cannot be determined otherwise than as petitioners contend.

In *Sandusky v. National Bank*, 23 Wall. 289, 23 L. Ed. 155, the Supreme Court said:

“A proceeding in bankruptcy from the time of its commencement by the filing of a petition to obtain the benefits of the act, until the final settlement of the estate of the bankrupt, is but one suit. The District Court for all purposes of its bankruptcy jurisdiction is always open. It has no separate terms. Its proceedings in any pending suit are therefore at all times open for reexamination upon application therefor in appropriate form. Any order made in the progress of

the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation.

In re Glory Bottling Company of New York, Inc., 283 Fed. 110 (C. C. A. 2nd), the court said:

“In bankruptcy proceedings the whole period from the filing of the petition to final disposition constitutes but one term.”

In Van Dever v. Phillips and Buttorf, 112 Fed. 966 (C. C. A. 5th), the court said:

“In other proceedings the power of the Court to set aside its decrees on proper showing expires with the end of the term in which the decree is made. In bankrupt proceedings no such limitation obtains, or rather the whole period from the filing of the petition to the final settlement of the proceedings constitutes but one term.”

If the order complained of must, as petitioners believe, be taken as holding that petitioners' application for correction was not timely, it squarely conflicts with the decisions noted.

Point III.

Petitioners contend that their petition and motion for recall of the mandate and correction of the judgment is meritorious in that the error of the decision of May 2, 1939, by the Circuit Court of Appeals has been clearly established. By denying the application, the Circuit Court of Appeals has in effect adhered to a decision squarely in conflict with the decisions of the United States Supreme Court interpreting the Bankruptcy Act, and particularly Section 75 thereof.

The gist of the decision of the Circuit Court of Appeals rendered on May 2, 1939, was that there was no stay in

effect at the time appellants' property was sold at foreclosure sale in the State courts, or at the expiration of the regular redemption period following such sale; that appellants were not entitled to the judicial stay under subsection (s) of Section 75 of the Bankruptcy Act for two reasons, (1) that appellants did not comply with the provisions of Section 75, and (2) that they were unable to refinance themselves within three years or at all; and that, therefore, the appellants were not entitled to the relief demanded.

It is pointed out in the opinion that the orders appealed from were based upon findings and that the evidence upon which the findings were based was not incorporated in the record. But, as a matter of fact, no testimony was ever taken nor hearing held upon which to base findings relative to ability to rehabilitate financially. However, as the Circuit Court of Appeals considers itself bound by these findings, it is important to an analysis of the opinion and a comparison with the *Bartels* case *supra*; to examine the exact language of these findings so far as they are material to the points in question.

The relevant portions are as follows:

Findings of Fact.

I.

That on the 19th day of December, 1934, Martin J. Bernards and Lena Bernards were, by order and judgment of this court, duly adjudicated bankrupts, and said bankrupts sought relief under the provisions of the "Frazier-Lemke" amendment, known as subdivision "s", Section 75 of the Act of Congress, known as the Bankruptcy Act.

XI.

That the said bankrupts have made no attempt to comply with the conditions required of them by the "Frazier-Lemke" amendment to the Acts of Congress in relation to bankruptcy, necessary to be complied

with by them in order to obtain the right and privilege of a three year's stay of enforcement of the obligations owned and held by their creditors and possession of the real and personal property described in the schedules attached to their debtor's petition on file in this cause on a rental basis, as provided in subdivision (s) of Section 75 of the Bankruptcy Act.

XII.

That the said Martin J. Bernards and Lena Bernards, bankrupts, have never at any time submitted any proposal for a composition and extension which was an equitable and feasible plan for the liquidation of the claims of their secured creditors or other creditors which would result in the financial rehabilitation of the said bankrupts.

XIII.

That the said Martin J. Bernards and Lena Bernards at the time of the filing of the debtor's petition, on December 19th, 1934, and at all times, thereafter, have been in truth and in fact beyond all hope of financial rehabilitation and the only effect of further proceedings and delays on their behalf in this bankruptcy proceeding will be to postpone the inevitable liquidation of their financial affairs without benefit to them and resulting in great hardship to the creditors, preferred and common, of the said bankrupt.

XIV.

On account of the findings aforesaid, and by reason of other matters appearing in the record and files in this cause and which, by reference, are made a part of this answer, the bankrupts have shown and established that there has at no time since the inception of these bankruptcy proceedings, been any possibility of financial rehabilitation of the bankrupts; that they have been barred and precluded from the relief conditionally granted by sub-division (s) of Section 75 of the Bankruptcy Act.

Briefly it may be said that the Circuit Court of Appeals relied upon its interpretation of subsection (s) of Section 75, and footnote 6 to the case of *Wright v. Vinton Branch, supra*, and concluded therefrom that under the findings appellants were not entitled to relief.

On December 4, 1939, the Supreme Court of the United States rendered its decision in the case of *John Hancock Mutual Life Insurance Company v. Bartels, supra*. The facts there were that after adjudication under subsection (s) of Section 75, and after application for the benefits of said subsection, the adjudication was set aside and the debtor proceedings dismissed by the District Court, on the ground that the debtor had not made a good faith offer for a composition or extension and that there was no reasonable probability of the debtor's financial rehabilitation. On appeal, the Circuit Court of Appeals for the Fifth Circuit set aside the order dismissing the debtor's petition and directed that the proceedings be reinstated. In sustaining this decision of the Circuit Court of Appeals, the Supreme Court, speaking through Mr. Chief Justice Hughes, used the following language:

At the hearing of the motion on April 5, 1938, the court received the evidence previously taken before the commissioner and additional testimony. Thereupon the motion was granted. The District Judge said in his opinion that the debtor had not made any proposal which could be construed as a "Good faith offer for an extension or composition" and hence the debtor was not entitled to be adjudged a bankrupt under subsection (s). The District Judge observed that the evidence was conflicting as to the value of the land (100 acres); that, separating the land from its improvements, certain of the debtor's witnesses placed its value at \$70 an acre and the improvements at \$5,000 or \$6,000, while witnesses for the creditor valued the land at about \$40 an acre and the improvements at about

\$2,000.00. He thought that there was no reasonable probability of the debtor's financial rehabilitation. In that view the District Judge concluded "that the order adjudicating the debtor a bankrupt under subsection (s) was improperly entered and should be set aside and the case dismissed."

We think that the District Judge failed to follow the mandate of the statute and that the Court of Appeals was right in reversing the judgment and ordering the proceeding to be reinstated.

The subsection of Section 75 which regulate the procedure in relation to the effort of a farmer-debtor to obtain a composition or extension contain no provision for a dismissal because of the absence of a reasonable probability of the financial rehabilitation of the debtor.³ Nor is there anything in these subsections which warrants the imputation of lack of good faith to a farmer-debtor because of that plight. The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to seek an agreement with their creditors (subsections (a) to (r)) and, failing this, to ask for the other relief afforded by subsection (s). The farmer-debtor may offer to pay what he can, as Bartels did, and he is not to be charged with bad faith in taking the course for which the statute expressly provides. The only reference in Section 75 to good faith is found in subsection (i), which relates solely to the confirmation of proposals for composition or extension when the court must be satisfied that the offer and its acceptance are in good faith and have not been made or procured by forbidden means or except as provided in the statute. That provision manifestly hits at secret advantages to favored creditors or other improper or fraudulent conduct.

As Bartels' case thus fell within subsection (s), he amended his petition and asked to be adjudicated a bankrupt as that subsection permits. He was so adjudi-

³ What is aid upon this point in Note 6 in *Wright v. Vinton Branch*, 300 U. S. 440, 462, was not essential to the opinion in that case and is not supported by the terms of the statute.

cated. Bartels then asked, also as provided in subsection (s), that his property be appraised, that his exception be set aside to him as provided by state law and that he be allowed to retain possession of his property under the supervision of the court, that is, subject to such orders as the court might make in accordance with the statute. The court failed to take that action. Instead of having the property appraised, the court received conflicting testimony as to value, discussed the chances of the debtor's rehabilitation and dismissed the petition and all proceedings thereunder.

The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved.

By comparing this language with that of the decision of the Circuit Court of Appeals in the instant case, it immediately becomes apparent that the Circuit Court of Appeals approved the action of the District Court in refusing to grant appellants the benefits provided under subsection (s) on the grounds, that they did not comply with the provisions of Sec. 75, and that they were unable to refinance themselves within three years or at all, while in the *Bartels'* case the Supreme Court held that the District Court must follow the mandate of the statute and cannot refuse to grant the benefits of the subsection because the farmer-debtor offered to pay what he could, or because of the absence of a reasonable probability of his financial rehabilitation.

It is therefore submitted that the decision of the Circuit Court of Appeals is squarely in conflict with the law as expressed by the Supreme Court.

Some mention should here be made of the finding that "appellants did not comply with provisions of Sec. 75".

The findings of the District Court in this connection, heretofore quoted verbatim, indicate clearly that this must be considered in connection with, and relates solely to the offer of composition and extension made while under subsections (a) to (r). Should there be any doubt remaining on this score, reference to the record made in the District Court shows that appellants did everything that could be properly required of them, and that there is no foundation in the record for this indefinite finding except the questions of a good faith proposal. Petitioners challenge respondents to point out to the court any particular wherein appellants failed to meet the requirements of the act, except for the disputed matters of good faith and financial rehabilitation which have both been disposed of by the *Bartels'* decision.

In *Kalb v. Feuerstein*, *supra*, the Supreme Court states with unmistakable clarity that at all times and under all circumstances (except where express permission of the bankruptcy court is obtained) the exclusive jurisdiction over the property of a farmer-debtor rests in the bankruptcy court and the State courts are powerless to proceed. The Circuit Court of Appeals in its decision of May 2, 1939, relied on the case of *Hardt v. Kirkpatrick*, 91 F. (2d) 875, referred to in the opinion for the proposition that the only stay under subsection (s) of Section 75 of the Bankruptcy Act, was a judicial stay. The decision in the *Kalb* case clearly vitiates the decision in the *Hardt* case in the following language:

"As stated by the Senate Judiciary Committee in reporting these amendments: * * * subsection (n) brings all of the bankrupt's property, wherever located, under the absolute jurisdiction of the bankruptcy court, where it ought to be * * *"

"* * * By reading subsection (n) to (o) as now amended in this bill, it becomes clear that it was the intention of Congress when it passed section 75, that the farmer-debtor and all of his property should come under the jurisdiction of the court of bankruptcy, and

that the benefits of the act should extend to the farmer prior to the confirmation of sale, during the period of redemption, and during a moratorium; and that no proceedings after the filing of the petition should be instituted, or if instituted prior to the filing of the petition, should not be maintained in any court, or otherwise.

“• • • In harmony with the general plan of giving the farmer an opportunity of rehabilitation, he was relieved—after filing a petition for composition and extinction—of the necessity of litigation elsewhere and its consequent expense. *This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.*”

Trustee Order Appealed.

The Circuit Court of Appeals for the Ninth Circuit in its decision of May 2, 1939, held that the order of the District Court approving trustee entered on December 15, 1936 was not appealed from and became final on January 15, 1937. Petitioners contend that the conciliation commissioner and the District Court were without jurisdiction to appoint a trustee because the act does not provide for a trustee in the instant case, and therefore the orders of August 8, 1936 and December 15, 1936 were void. However, should the court hold that the order of December 15, 1936 to be voidable and required appeal within thirty days then petitioners maintain that their petition diligently filed on January 4, 1937 with the conciliation commissioner before any intervening rights had accrued, and before the thirty days appeal period had expired, asking for removal of trustee, which petition was denied on January 11, 1937 and a review taken to the District Court on January 29, 1937, where it was affirmed on May 10th, 1938 properly retained jurisdiction of the issue. In support of this we quote from the Su-

preme Court decision in *Wayne United Gas Co. v. Owens Illinois Glass Co. et al., supra.*

“Bankruptcy court in exercise of sound discretion if no intervening rights will be prejudiced by its action, may grant rehearing on application, diligently made, and rehear case on merits, and even though it reaffirms its former action and refuses to enter decree different from original one, order entered on rehearing is appealable and time for appeal runs from its entry.”

By adhering to the decision of May 2, 1939, the Circuit Court of Appeals has shown flagrant disregard for the edict of the Supreme Court and for petitioners' right to justice. After six years in court, battling for their rights, petitioners' position was finally and uncontrovertably vindicated by the Supreme Court decisions hereinabove referred to. But petitioners' victory is empty unless they may have the benefits thereof. Under these circumstances denial of petitioners' right for want of an earlier expression by the Supreme Court would be a travesty on justice when, in the exercise of sound discretion, the error and injustice may be corrected.

Petitioners respectfully submit that their petition for certiorari should be granted.

MARTIN J. BERNARDS,

LENA BERNARDS,

Petitioners Pro Se.

APPENDIX.**Section 75, Bankruptcy Act, Agricultural Compositions and Extensions, 11 U. S. C. A., Sec. 203.****Subsection (n).**

“The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under (this section) section 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

“In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. The words ‘period of redemption’ wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been filed and

a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same in the clerk or court.

Subsection (o).

"Except upon petition made to and granted by the Judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court.

(1) Proceedings for any demand, debt, or account, including any money demand;

(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, recession, or specific performance of any agreement for sale of land or for recovery of possession of land;

(3) Proceedings to acquire title to land by virtue of any tax sale;

(4) Proceedings by way of execution, attachment or garnishment;

(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

(6) Seizure, distress, sale or other proceeding under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

Subsection (s).

"Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bank-

rupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act; Provided, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a

period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semi-annually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: PROVIDED, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court,

less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: PROVIDED, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

(4) The conciliation commissioner, appointed under subsection (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed \$35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under subsection (s) of section 75 of this Act, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under section 75 of this Act shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer

debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this Act. The provisions of this Act shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

(5) This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under ~~the~~ General Bankruptcy Act may take advantage of this section upon written request to the court, and a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section.

(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate.

Approved, August 28, 1935.

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CHARLES ELMORE CL
STATES

SUPREME COURT OF THE UNITED

OCTOBER TERM, 1940

No. 54

MARTIN J. BERNARDS AND LENA BERNARDS,

Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF PORT-
LAND AND JOSEPH H. LOOMIS, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

PETITIONERS' BRIEF ON THE MERITS.

WILLIAM LEMKE,
Counsel for Petitioners.



INDEX.

SUBJECT INDEX.

	Page
Brief on the merits	1
Caption	1
Nature of the case	1
Opinion below	1
Jurisdiction	2
Statement of the case	2
Questions involved	10
Specification and assignment of error	11
Summary of argument	11
Argument—Point I	12
On jurisdiction	12
Argument—Point II	12
Timely application	12
Argument—Point III	16
Merits	16
On appointment of trustee	24
Conclusion	30
Appendix	33

CASES CITED.

<i>Borchard et al. v. Bank of California et al.</i> , 60 Sup. Ct. 957	21
<i>Bronson v. Schulten</i> , 104 U. S. 410, 26 L. Ed. 797	14
<i>Hardt v. Kirkpatrick</i> , 91 F. (2d) 875	27
<i>In re Glory Bottling Co. of New York, Inc.</i> , 283 Fed. 110	15
<i>John Hancock Mutual Life Ins. Co. v. Bartels</i> , 308 U. S. 180, 60 Sup. Ct. 221	10, 16
<i>Kalb v. Feuerstein</i> , 60 Sup. Ct. 343	10, 16, 26
<i>Louisville Joint Stock Land Bank v. Radford</i> , 295 U. S. 555	3
<i>Miocene Ditch Co. v. Champion</i> , 197 Fed. 497	14
<i>Sandusky v. National Bank</i> , 23 Wall. 289, 33 L. Ed. 155	15

	Page
<i>Staude Mfg. Co. v. Labombarde</i> , 247 Fed. 879	14
<i>Union Joint Stock Land Bank v. Byerly</i> , 60 Sup. Ct. 773	28
<i>United States v. Benz</i> , 282 U. S. 304, 51 Sup. Ct. 113	12
<i>Utah P. & P. Co. v. U. S.</i> , 242 Fed. 924	14
<i>Van Dever v. Phillips and Buttorf</i> , 112 Fed. 966	15
<i>Wayne United Gas Co. v. Owens Illinois Glass Co. et al.</i> , 300 U. S. 131, 57 Sup. Ct. 383	12, 26
<i>Wright v. Vinton</i> , 300 U. S. 440	17, 23

OTHER AUTHORITIES CITED.

5 C. J. S. 1996	15
15 C. J. Courts, p. 729, Par. 24	24
Foster Federal Practice	14

SUPREME COURT OF THE UNITED STATES

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PETITIONERS' BRIEF ON THE MERITS.

Nature of the Case.

This case is here on certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, and involves the construction and interpretation of Section 203, Title 11, U. S. C. A. as amended. The question involved is the propriety of the action of the United States Circuit Court of Appeals for the Ninth Circuit in denying petitioners' application to recall the mandate and correct the judgment based upon a prior decision.

Opinion Below.

The final order of the United States Circuit Court of Appeals for the Ninth Circuit rendered on March 22, 1940, denying petitioners' application to recall the mandate and

correct the judgment entered in the District Court pursuant to the decision of the Circuit Court of Appeals handed down on May 2, 1939, was rendered without opinion. The original opinion of the Circuit Court of Appeals of May 2, 1939, affirming separate orders in bankruptcy of the District Court of the United States of the District of Oregon, is reported in 103 F. (2d) 567.

Jurisdiction.

Certiorari was granted by order of this Court made and entered April 29, 1940. The Supreme Court of the United States has jurisdiction because the case involves the construction and interpretation of Federal statutes, to-wit: Section 75 of the Bankruptcy Act.

Statement of the Case.

This proceeding was initiated by petitioners on August 10, 1934, in the District Court of the United States for the District of Oregon by a petition for composition or extension pursuant to Section 75 of the Bankruptcy Act (R. 1-2).

Included in the schedules attached to said petition were 16 parcels of real property in Washington County, Oregon, owned by petitioners, one of which was mortgaged to the Respondent Collins and all of which were mortgaged to the respondent M. R. Johnson. The Johnson mortgage or some interest therein had been assigned to the Respondent, the United States National Bank. The obligations secured by the mortgages were past due and suits to foreclose had been commenced in the State courts. A foreclosure decree had previously been entered on the Johnson Mortgage but suit was still pending upon the Collins Mortgage when the petition was filed (R. 1-2).

On the same day, an order was entered by the court approving the petition as filed in good faith and the cause

was referred to a Conciliation Commissioner (R. 6). On December 19, 1934, petitioners filed their amended petition asking to be adjudged bankrupts under subsection (s) of Section 75 of the Bankruptcy Act and to have the benefits of the provisions of said subsection (R. 9-13). The same day an adjudication was entered and on December 20, 1934, the case was referred to a Referee in Bankruptcy (R. 14).

On February 8, 1935, petitioners addressed their petition to the court and the Referee asking for an appraisal and retention of possession of the whole of their estate (R. 36-37). Pursuant thereto, appraisers were appointed by the Referee but on May 27, 1935, before any appraisal was made, subsection (s) of said Section 75 was held unconstitutional by the Supreme Court (*Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555).

The proceedings herein were not dismissed but remained pending.

On June 29, 1935, a purported Sheriff's sale of the real property and certain bonds claimed as additional security for the mortgage debt was held under the foreclosure decree in favor of Respondent Johnson *et al.* in the State court, and the property and bonds were bid in by Respondents Johnson and The United States National Bank for a sum about \$18,000 less than the amount of the decree. On July 9, 1935, Respondent Collins obtained a purported foreclosure decree in the State court and pursuant thereto, a pretended Sheriff's sale was held on August 26, 1935, at which the Respondent Collins bid in the property which had been mortgaged to her. These sales were confirmed on July 20, 1935, and September 16, 1935, respectively.

On August 28, 1935, subsection (s) of Section 75 was amended. Frazier-Lemke Act of August 28, 1935, C. 792, 49 Stat. 942, 943. On September 30, 1935, petitioners filed their petition in the District Court reciting the proceedings theretofore had and reciting that the proceedings and

documents in the possession of the referee should be transferred to the court to be referred to the Conciliation Commissioner for Washington County and asking for an order directing the referee to transfer to the court all documents and records together with a report of all proceedings therein (R. 16-17).

On said 30th day of September, 1935, an order was made and entered by the court recalling the order of reference to the referee and directing the referee to transmit to the court all records, documents and proceedings in his possession together with a report of all proceedings had before him and further ordering that the proceedings be referred to the Conciliation Commissioner for Washington County (R. 17-18). Accordingly the referee transmitted to the court the documents and records of the proceedings including the amended petition of December 19, 1934, and the petition of February 8, 1935, for the benefits of the act including the appointment of appraisers, appraisal, and retention of possession by petitioners (R. 36-37). This latter petition was marked "Filed October 10, 1935", by the clerk of the court and forwarded to the Conciliation Commissioner together with the other documents. On October 15, 1935, an order was entered by the court referring the cause to the Conciliation Commissioner "to take such further proceedings therein as are required by said acts" and directing the bankrupts to attend before the Conciliation Commissioner and to submit to his orders or the orders of the court relating to the bankruptcy (R. 19).

No action was taken by the Conciliation Commissioner other than to hold the first hearing. On February 1, 1936, the Respondents Johnson, The United States National Bank and Collins, obtained possession of the mortgaged property by means of a Writ of Assistance issued out of the State Court. On the same day at the request of the Portland Loan Company and without permission of the bankruptcy court

the Sheriff seized petitioners' furniture, household goods and bedding and two weeks later sold same. The mortgage debt on the furniture was only \$300.00, which funds were used in the seeding of petitioners farm in the spring of 1934. Sheriff's Deeds were delivered to Respondents Johnson and Collins on July 1, 1936 and September 10, 1936 respectively.

On July 15, 1936, petitioners petitioned the Conciliation Commissioner for an order removing the mortgagees from the premises and requiring them to account to the debtors for the crops (R. 19-21). On July 24, 1936, Respondents Johnson and the United States National Bank filed an Answer and Cross Petition (R. 56). On August 8, 1936, petitioners filed their reply, and in addition to an order for the crops, requested of the Conciliation Commissioner an order permitting them the full benefits and provisions of the Frazier-Lemke Act as amended by Congress on August 28, 1935 (R. 22-23). On August 8, 1936, the Commissioner denied the debtors' petition and ordered the appointment of a Trustee (R. 49-53). On August 29, 1936, at a meeting of the creditors, respondent Loomis was elected by a minority of creditors and appointed by the Commissioner as Trustee in Bankruptcy and qualified on September 3, 1936 (R. 54). Creditors holding majority in amount of claims refused to approve a trustee as shown by affidavits attached to petition (R. 25-29). The Commissioner's orders appointing the Trustee and approving his bond were reviewed and on December 15, 1936, were affirmed by the court (R. 24).

On January 4, 1937, petitioners petitioned the Commissioner to remove the Trustee and put petitioners into immediate possession of the whole of their estate and to proceed with appraisal of property (R. 25-27). At a hearing on January 11, 1937, the Commissioner dismissed that petition (R. 30-31). At said hearing counsel for petitioners asked the Conciliation Commissioner whether or not in the

proceeding had before him, he proceeded under the Frazier-Lemke Act of August 28, 1935, and the Commissioner replied that he had. The Commissioner was then asked whether he had appointed appraisers under said act and if so, whether an appraisal had been made and the Commissioner replied that an appraisement had been made and produced from the files a document of that tenor and effect (R. 81-82). Petitioners were never informed prior to January 11, 1937, that an appraisal had been made, nor were they given an opportunity to object to appraisers, a universal practice.

The appraisals made (R. 58-61 and R. 63) do not include the following personal property, the value of which is fully two-thirds of the total value of personal property:

7 Orenco City Bonds (R. 45), value, \$7000.00 plus accrued interest (R. 26).

1 Caterpillar No. 34 Combine with pickup and grain-grading attachments (R. 44).

1 International TA 40 Tractor, crawler type (R. 44).

1 Universal Logging Trailer (R. 45).

1 1933 Ford Pickup Automobile (R. 45).

1 11 x 12 air compressor, 2 water pumps, 1 Fairbanks Scales, 1 six-horse Steam Boiler, 115 cords wood, 1 blower (R. 45).

An Attachment upon three parcels of real property (R. 45-46) deeds to which have since accrued.

Household goods, furniture, etc. (R. 46-47).

Unpaid accounts (R. 47).

85 acres of hairy vetch; 50 acres of oats and Austrian Peas; 100 acres of Victory Oats, 90 acres Barley, 2 tons vetch seed (R. 43-44).

The personal property which was appraised shows an appraisal on the average of only 35% of its actual cash value. This is shown by the following two items:

550 tons chopped hay (R. 44) appraised as *only 300 tons*, and at *only \$4.00 per ton* (R. 59), and sold at those amounts at *private sale* (R. 69). This chopped hay was worth \$11.00 per ton.

Petitioners exempt property appraised at \$497.00 (R. 61) was sold by petitioners for \$1406.00.

No objection was ever made to the partial appraisal for the reason that the trustee appointed by the Commissioner (R. 54) took the property wrongfully from the petitioners, and for the further reason that petitioners never learned that an appraisal had been made until January 11th, 1937, and a large part of the personal property was sold three days later (R. 32) whereas Section 75 (s) grants four months in which to file objections.

Petitioners farm, its legal description being in 16 parcels, has not yet been appraised (R. 59).

There has not yet been included in the petitioners' schedule of assets as requested, a chose in action based on a pending law action against Respondent Johnson in the amount of \$18,280.00 exclusive of court costs and punitive damages (R. 26).

On January 15, 1937, petitioners petitioned the court to reverse the commissioner's orders of August 8, 1936, September 3, 1936, and January 11, 1937 (R. 77-87). In answer to the petition respondent Collins prayed that her title to the mortgaged property be quieted, respondent Johnson and The United States National Bank prayed that their title to the mortgaged property be quieted, and the trustee prayed that the acts done by him be approved and that he be directed to complete the administration of the bankrupts' estate by payment of expenses and distribution to creditors (R. 81-91, 91-100).

On January 29, 1937, petitioners filed a petition with the Conciliation Commissioner asking a review of the Concilia-

tion Commissioner's order of January 11, 1937, which order denied petitioners' request to remove trustee (R. 33-34).

On April 13, 1938, petitioners filed a motion to vacate and set aside all orders of the court and of the referee and conciliation commissioner where it was sought to set aside or delay the carrying out of the provisions of section 75 of the Bankruptcy Act and that the cause be promptly reinstated without any additional filing fees or charges. This motion was based upon contentions as follows:

1. That the referee in bankruptcy and the conciliation commissioners had no jurisdiction to pass on the adjudication of bankrupts or the qualifications of bankrupts to come under Section 75 of the Bankruptcy Act.

2. That the referee in bankruptcy and conciliation commissioners had no jurisdiction to proceed until they had complied with the mandatory provision of the Bankruptcy Act and particularly the provisions and the amendments of Section 75 of the Bankruptcy Act.

3. That under the amendments of Section 75 of the Bankruptcy Act approved March 4, 1938, where the Conciliation Commissioner had improperly held new subsection (s) unconstitutional as applied to the land, petitioners were entitled to have the cause promptly reinstated without additional filing fees or charges.

4. That after adjudication no further affirmative action by the petitioners is necessary until the referee and conciliation commissioners had complied with the mandatory provisions of the Bankruptcy Act and particularly Section 75 (R. 34-35).

On May 10, 1938, the court entered an order confirming order of Conciliation Commissioner denying petitioners' petition of January 4, 1937, which petition asked for the removal of the trustee (R. 39).

On May 10, 1938, the court made and entered findings of fact and ordered that petitioners' petition of January 15, 1937, be dismissed, granted the respondents the relief prayed for in their answer, and ordered that petitioners' motion of April 13, 1938, be denied (R. 37-39). In the findings upon which these orders were based the court found that the land was mortgaged, that foreclosure sales had been held, that there had been no redemption, that petitioners had made no attempt to comply with the conditions required of them in order to obtain the right and privilege of a three years' stay of enforcement of their obligations and the right to possession of their property; that at the time of filing their petition on December 19, 1934, and at all times thereafter, petitioners have been beyond all hope of financial rehabilitation and that the only effect of further proceedings on petitioners' behalf in the bankruptcy would be to postpone the inevitable liquidation of petitioners' financial affairs without benefit to them and resulting in great hardship to the creditors (R. 64-74).

No oral testimony was introduced in the District Court.

Thereafter petitioners prosecuted an appeal under section 24-B of the Bankruptcy Act to the United States Circuit Court of Appeals for the Ninth Circuit. On May 2, 1939, the Circuit Court of Appeals rendered its opinion and affirmed the orders entered in the District Court.

Thereafter petitioners made timely application to the Supreme Court of the United States for a writ of certiorari to review the judgment of the Circuit Court of Appeals aforesaid, and according to law the issuance of the mandate was stayed pending the disposition of the matter in the Supreme Court (R. 158).

On October 23, 1939, the petition for certiorari was denied without opinion. Immediately upon receipt of notice thereof, petitioners sought to obtain an Order withholding the mandate pending the anticipated decisions of the

Supreme Court interpreting section 75 of the Bankruptcy Act. Upon information that the mandate had already issued, petitioners moved in the District Court to withhold the entry thereof and moved simultaneously in the Circuit Court of Appeals to have the same recalled and held (R. 159). This application was instantly denied (R. 160).

On December 4, 1939, the Supreme Court handed down its decision in the case of *John Hancock Mutual Life Insurance Company v. Bartels*, 60 Supreme Court Rept. 221, 308 U. S. 180. As is hereinafter more fully developed, petitioners consider it to be controlling in the instant case and to require the correction of the decision of the Circuit Court of Appeals of May 2, 1939. Accordingly petitioners promptly filed in the Circuit Court of Appeals their motion and petition to recall the mandate and correct the judgment, upon the authority of the *Bartels* case (R. 160). On January 2, 1940, the Supreme Court rendered its decision in the case of *Kalb v. Feuerstein* (60 Supreme Court Rept. 343). Petitioners believe the propositions decided in the *Kalb* case are determinative of the instant case and left the decision of the Circuit Court of Appeals of May 2, 1939, absolutely without foundation.

Accordingly the aforesaid Motion and Petition was supplemented to call the attention of the Circuit Court of Appeals to this decision. The matter then remained pending in the Circuit Court of Appeals without action until March 22, 1940, when the Motion and Petition were denied without reason therefor being assigned (R. 162). Thereafter on April 29, 1940 this Court granted certiorari to review this last mentioned action of said Circuit Court of Appeals.

Questions Involved.

The questions involved in the case are briefly (1) the propriety of correcting a decision of a Circuit Court of Appeals to conform to a subsequent Supreme Court decision, and (2) the construction and interpretation of Sec-

tion 75 of the Bankruptcy Act with reference (a) to the nature and existence of a stay against proceedings in the State courts, (b) the propriety of refusing the farmer the benefits of subsection (s) on the grounds of bad faith proposal, and inability to refinance, and (c) the validity of orders of the District Court and Conciliation Commissioner relating to the appointment of a trustee in bankruptcy under subsection (s).

Specification and Assignment of Error.

I.

The United States Circuit Court of Appeals for the Ninth Circuit erred in denying petitioners' Motion and Petition to Recall and Correct its Mandate to the District Court of the United States for the District of Oregon.

Summary of Argument.

Petitioners contend that the decision of the Circuit Court of Appeals rendered herein on May 2, 1939, was erroneous in law, and that the error was established by the subsequent decisions of the Supreme Court in *John Hancock Mutual Life Insurance Company v. Bartels*, *post*, and *Kalb v. Feuerstein*, *post*, which held, contrary to said decision of the Circuit Court of Appeals, that after the filing of the amended petition under Section 75 of the Bankruptcy Act, the benefits of subsection (s) may not be arbitrarily refused on the grounds of asserted bad faith proposal or asserted inability to refinance, and that the initiation of proceedings under Section 75 automatically stays all action in the State courts until such proceedings have reached final disposition.

Petitioners further contend that the facts show timely application for correction of the error and that, since sound discretion required it, failure to make the correction constituted an abuse of discretion.

ARGUMENT.

Since the order herein to be reviewed was entered without written opinion, the basis for the denial is necessarily a matter of conjecture. However, there are but three possible grounds for denying petitioners' application, all of which must be assumed to have been resolved against petitioners. These are, first, that the Circuit Court of Appeals had no jurisdiction to make the correction; second, that the application was not timely, or, third, that the application was without merit. Each of these propositions is hereinafter separately discussed.

POINT I.**The Circuit Court of Appeals Had Jurisdiction to Recall and Correct Its Mandate.**

With respect to jurisdiction, respondents themselves acknowledged the inherent jurisdiction of a court to correct its judgments and orders upon timely application. The Supreme Court has often reaffirmed this proposition. *Wayne United Gas Company v. Owens Illinois Glass Company*, 57 Sup. Ct. Rep. 382, 300 U. S. 131; *United States v. Benz*, 51 Sup. Ct. 113, 282 U. S. 304.

Petitioners feel that the matter of the jurisdiction of the Circuit Court of Appeals to correct its mandate is so well settled as to warrant no further discussion.

POINT II.**The Application to Recall and Correct the Mandate was Timely.**

For convenience, the chronology of events relating to the application for correction of the error may be briefly restated as follows:

May 2, 1939—Decision of Circuit Court of Appeals on original appeal.

July 10, 1939—Petition for certiorari filed.

Oct. 23, 1939—Petition for certiorari denied.

Nov. 4, 1939—Motions to withhold mandate filed in Circuit Court of Appeals and District Court.

Nov. 6, 1939—Motions to withhold mandate denied.

Dec. 4, 1939—Decision of Supreme Court in *John Hancock Mutual Life Insurance Company v. Bartels*, post.

Jan. 2, 1940—Motion and petition to recall mandate and correct judgment filed in Circuit Court of Appeals.

Jan. 2, 1940—Decision of Supreme Court in *Kalb v. Feuerstein*, post.

Jan. 18, 1940—Motion and petition for recall and correction supplemented on basis of *Kalb* case.

Mar. 22, 1940—Motion and petition denied by Circuit Court of Appeals without opinion.

Apr. 12, 1940—Petition for certiorari filed.

Apr. 29, 1940—Certiorari granted.

It is petitioners' contention that the record shows all possible diligence on their part to obtain a correction of the error, and that under the authorities their application was timely.

It will be noted first, that the original decision of the Circuit Court of Appeals was rendered during the course of a regular term, that issuance of the mandate was stayed during that term by the filing of a petition for certiorari, that certiorari was denied during the succeeding regular terms of the Circuit Court of Appeals during which the mandate issued, the subsequent Supreme Court decisions were rendered, and the application for correction was made to and denied by the Circuit Court of Appeals.

With respect to proceedings other than in bankruptcy, it appears that the matter of terms is of considerable importance, and it is often said that a court retains jurisdiction over its judgments and orders *during the term*. Such a statement is incomplete and must be qualified.

Thus in *Bronsen v. Schulten*, 104 U. S. 410, 26 L. Ed. 797, the Supreme Court, while denying the relief prayed for because of a lapse of 17 years time, pointed out that the only judgments over which jurisdiction is lost by the expiration of the term are "final judgments", and that where steps are taken within the term to correct the error, the judgment does not become final.

Therefore in the instant case where a petition for certiorari was filed during the term at which the decision was made, and the issuance of the mandate was accordingly stayed, the decision could not have become final at the term when rendered.

The language of many decisions indicates that the time of the issuance of the mandate is controlling rather than the time when the decision is made. In the instant case, the mandate was not issued until the term at which the application for correction was made.

In *Miocene Ditch Co. v. Champion*, 197 Fed. 497 (9th Circuit) this same Circuit Court of Appeals considered the time of issuance of the mandate as determinative, and where the term at which the mandate had issued had expired, held that the application was not timely.

In *Staude Mfg. Co. v. Labombards*, 247 Fed. 879 (1st Circ.) the mandate had issued, and, after the expiration of the term, application was made for its recall and correction. Though the mandate had not been entered below, the petition for recall was denied because the mandate had issued in the previous term. The court there cited Foster, Federal Practice, 4th Ed., p. 2149, for the proposition that mandates can be recalled during the term for correction but not afterwards.

In *Utah P. & L. Co. v. U. S.*, 242 Fed. 924, the mandate was recalled after the term, for correction to conform to an intervening Supreme Court decision.

In 5 C. J. S., Sec. 1996, the rule is stated that :

“An appellate court generally has power to recall its mandate, at least during the term at which it was issued.”

In the instant case, the record shows that petitioners applied to the Circuit Court of Appeals for correction of the error during the term at which the judgment became final and the mandate issued. *No intervening rights have been or can be shown.* Under the authorities, petitioners' application was clearly in time.

Finally, there is substantial authority for the proposition that there are no terms in bankruptcy proceedings.

In *Sandusky v. National Bank*, 23 Wall. 289, 23 L. Ed. 155, the Supreme Court said :

“A proceeding in bankruptcy from the time of its commencement by the filing of a petition to obtain the benefits of the act, until the final settlement of the estate of the bankrupt, is but one suit. The District Court for all purposes of its bankruptcy jurisdiction is always open. It has no separate terms. Its proceedings in any pending suit are therefore at all times open for reexamination upon application therefor in appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation.

In *re Glory Bottling Company of New York, Inc.*, 283 Fed. 110 (C. C. A. 2nd), the court said :

“In bankruptcy proceedings the whole period from the filing of the petition to final disposition constitutes but one term.”

In *Van Deveer v. Phillips and Buttorf*, 112 Fed. 966 (C. C. A. 5th), the court said :

“In other proceedings the power of the Court to set aside its decrees on proper showing expires with the

end of the term in which the decree is made. In bankrupt proceedings no such limitation obtains, or rather the whole period from the filing of the petition to the final settlement of the proceedings constitutes but one term."

Since there can be no question here of *laches* or vested rights, it is submitted that under the authorities, petitioners' application was timely.

POINT III.

Petitioners' Application for Correction was Meritorious.

Petitioners contend that error in two vital respects has been established in the decision of May 2, 1939, by the cases of *John Hancock Mutual Life Insurance Company v. Bartels*, 308 U. S. 180, 60 Sup. Ct. 221, and *Kalb v. Feuerstein*, 60 Sup. Ct. 343.

The Bartels Case.

(a) On Bad Faith and Inability to Refinance.

The facts in the *Bartels* case were that after adjudication under subsection (s) of Section 75, and after application for the benefits of the subsection, the adjudication was set aside and the debtor proceedings dismissed by the District Court, on the grounds that the debtor had not made a good faith offer for a composition or extension, and that there was no reasonable probability of the debtor's financial rehabilitation. On appeal, the Circuit Court of Appeals for the Fifth Circuit set aside the order dismissing the debtor's petition and directed that the proceedings be reinstated. Because of the materiality in the present connection of the language of Mr. Chief Justice Hughes, speaking for the Supreme Court in affirming the Circuit Court of Appeals, we quote somewhat at length from the opinion:

At the hearing of the motion on April 5, 1938, the court received the evidence previously taken before the

commissioner and additional testimony. Thereupon the motion was granted. The District Judge said in his opinion that the debtor had not made any proposal which could be construed as a "Good faith offer for an extension or composition" and hence the debtor was not entitled to be adjudged a bankrupt under subsection (s). The District Judge observed that the evidence was conflicting as to the value of the land (100 acres); that, separating the land from its improvements, certain of the debtor's witnesses placed its value at \$70 an acre and the improvements at \$5,000 or \$6,000, while witnesses for the creditor valued the land at about \$40 an acre and the improvements at about \$2,000.00. He thought that there was no reasonable probability of the debtor's financial rehabilitation. In that view the District Judge concluded "that the order adjudicating the debtor a bankrupt under subsection (s) was improperly entered and should be set aside and the case dismissed."

We think that the District Judge failed to follow the mandate of the statute and that the Court of Appeals was right in reversing the judgment and ordering the proceeding to be reinstated.

The subsections of Section 75 which regulate the procedure in relation to the effort of a farmer-debtor to obtain a composition or extension contain no provision for a dismissal because of the absence of a reasonable probability of the financial rehabilitation of the debtor.³ Nor is there anything in these subsections which warrants the imputation of lack of good faith to a farmer-debtor because of that plight. The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to seek an agreement with their creditors (subsections (a) to (r)) and, failing this, to

³ What is said upon this point in Note 6 in *Wright v. Vinton Branch*, 300 U. S. 440, 462, was not essential to the opinion in that case and is not supported by the terms of the statute.

ask for the other relief afforded by subsection (s). The farmer-debtor may offer to pay what he can, as Bartels did, and he is not to be charged with bad faith in taking the course for which the statute expressly provides. The only reference in Section 75 to good faith is found in subsection (i), which relates solely to the confirmation of proposals for composition or extension when the court must be satisfied that the offer and its acceptance are in good faith and have not been made or procured by forbidden means or except as provided in the statute. That provision manifestly hits at secret advantages to favored creditors or other improper or fraudulent conduct.

As Bartels' case thus fell within subsection (s), he amended his petition and asked to be adjudicated a bankrupt as that subsection permits. He was so adjudicated. Bartels then asked, also as provided in subsection (s), that his property be appraised, that his exception be set aside to him as provided by state law and that he be allowed to retain possession of his property under the supervision of the court, that is, subject to such orders as the court might make in accordance with the statute. The court failed to take that action. Instead of having the property appraised, the court received conflicting testimony as to value, discussed the chances of the debtor's rehabilitation and dismissed the petition and all proceedings thereunder.

The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved.

In the instant case, the language of the Circuit Court of Appeals in this connection was as follows:

"The court found that Appellants' have made no attempt to comply with the conditions required of them

by the 'Frazier-Lemke' amendment to the Acts of Congress in relation to bankruptcy, necessary to be complied with by them in order to obtain the right and privilege of a three years' stay of enforcement of the obligations owned and held by their creditors and possession of the real and personal property described in the schedules; 'that appellants' at the time of the filing of (their) petition, on December 19, 1934, and at all times thereafter, have been in truth and in fact beyond all hope of financial rehabilitation; 'and that' the only effect of further proceedings and delays on their behalf in this bankruptcy proceeding will be to postpone the inevitable liquidation of their financial affairs without benefit to them and resulting in great hardship to the creditors.'

"Thus, in effect, the court found (1) that appellants did not comply with the provisions of Section 75, and (2) that they were unable to refinance themselves within three years, or at all. Either of these facts would have warranted denial of the relief sought by appellants."

It is pointed out in the opinion that the orders appealed from were based upon findings and that the evidence upon which the findings were based was not incorporated in the record. As a matter of fact, no testimony was ever taken as a basis for these findings but the same were arbitrarily made by the Judge of the District Court.

At the risk of extending the argument in this connection it seems essential to quote the relevant portions of the District Court's findings:

Findings of Fact.

I.

That on the 19th day of December, 1934, Martin J. Bernards and Lena Bernards were, by order and judgment of this court, duly adjudicated bankrupts, and said bankrupts sought relief under the provisions of

the "Frazier-Lemke" amendment, known as subdivision "s", Section 75 of the Act of Congress, known as the Bankruptcy Act.

XI.

That the said bankrupts have made no attempt to comply with the conditions required of them by the "Frazier-Lemke" amendment to the Acts of Congress in relation to bankruptcy, necessary to be complied with by them in order to obtain the right and privilege of a three year's stay of enforcement of the obligations owned and held by their creditors and possession of the real and personal property described in the schedules attached to their debtor's petition on file in this cause on a rental basis, as provided in subdivision (s) of Section 75 of the Bankruptcy Act.

XII.

That the said Martin J. Bernards and Lena Bernards, bankrupts, have never at any time submitted any proposal for a composition and extension which was an equitable and feasible plan for the liquidation of the claims of their secured creditors or other creditors which would result in the financial rehabilitation of the said bankrupts.

XIII.

That the said Martin J. Bernards and Lena Bernards at the time of the filing of the debtor's petition, on December 19, 1934, and at all times, thereafter, have been in truth and in fact beyond all hope of financial rehabilitation and the only effect of further proceedings and delays on their behalf in this bankruptcy proceeding will be to postpone the inevitable liquidation of their financial affairs without benefit to them and resulting in great hardship to the creditors, preferred and common, of the said bankrupt.

XIV.

On account of the findings aforesaid, and by reason of other matters appearing in the record and files in this cause and which, by reference, are made a part of

this answer, the bankrupts have shown and established that there has at no time since the inception of these bankruptcy proceedings, been any possibility of financial rehabilitation of the bankrupts; that they have been barred and precluded from the relief conditionally granted by sub-division (s) of Section 75 of the Bankruptcy Act.

Considering these findings in connection with the language of the Circuit Court of Appeals, and comparing the result with the language of the *Bartels* case, it immediately becomes apparent that the Circuit Court of Appeals approved the action of the District Court in refusing petitioners the benefits provided by subsection (s) on the grounds that they did not comply with the provisions of Section 75, and that they were unable to refinance themselves within three years or at all, while in the *Bartels* case the Supreme Court held that the District Court must follow the mandate of the statute and cannot refuse the benefits of the subsection because the farmer-debtor offered to pay what he could, or because of the absence of a reasonable probability of his financial rehabilitation.

The interpretations of Section 75 (s) made in the *Bartels* case were confirmed and enlarged by this Court in *Borchard et al. v. California Bank et al.*, 60 Sup. Ct. 957. Because of the similarity to the instant case we quote from the opinion:

We are of opinion that the action of the District Court in permitting the creditor to proceed to a sale for the enforcement of its liens at this stage of the proceeding was contrary to the provisions of Section 75 (s). That this is so is made plain by our decisions in *Wright v. Vinton Branch of Mountain Trust Bank*, supra, and *John Hancock Ins. Co. v. Bartels*, 308 U. S. 180. As was said in the latter case (p. 187):

“The scheme of the statute is designed to provide an orderly procedure so as to give whatever

relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved."

Instead of prosecuting the cause before the Conciliation Commissioner pursuant to the debtors' petition, the bank resorted to a procedure not contemplated by the statute, evidently on the theory that it could obtain some advantage by that course. By written stipulations the bank consented to the retention of possession by the debtors and arranged that they should cooperate in the cultivation and conservation of the real estate, for payment of taxes, and for payments to the debtors. For more than thirty-one months after the petition for appraisal was filed no action was taken. An appraisal was thereafter made. No stay order has been entered fixing terms on which the debtors are to remain in possession. The petitioners were entitled to compliance with the procedure required by the statute. The bank, at any time, could have obtained action by the Conciliation Commissioner and the court, in accordance with the statute. It cannot now maintain that the disorderly and unauthorized procedure followed by the parties is the equivalent of that prescribed by the statute and that, as the petitioners have not been able to rehabilitate themselves, it is entitled to enforce its liens.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

In the *Borchard* case the farmer-debtors remained in possession for more than thirty-one months reaping the harvests, evidently under a rental arrangement more severe than that granted them by the statute. On the other hand in the instant case the petitioners seeded their crops in the fall of 1934 and spring of 1935 but the harvests were reaped by the respondents subsequent to the purported sheriff's sale on June 29, 1935.

Briefly, it may be said that the Circuit Court of Appeals, in its decision, relied upon its interpretation of subsection (s) of Section 75, and footnote 6 to the case of *Wright v. Vinton Branch*, 360 U. S. 440, and concluded therefrom that under the findings petitioners were not entitled to relief. The decision in the *Bartels* case as enlarged and confirmed in the *Borchard* case has established the error in the lower court's decision, and it has now been settled once and for all that when the farmer-debtor amends his petition and requests the benefits of subsection (s), the Conciliation Commissioner and the District Court must carry out the mandatory provisions of the said subsection (s).

(b) On Compliance With Section 75.

Some mention should here be made of the finding that "appellants did not comply with the provisions of Section 75." The findings of the District Court in this connection, hereinbefore quoted verbatim, indicate clearly that this relates solely to the offer of composition and extension made while under subsections (a) to (r). Should there be any doubt remaining on this score, reference to the record made in the District Court shows that petitioners did everything that could properly be required of them, and that there is no foundation in the record for this indefinite finding except the question of "good-faith proposal". Petitioners challenge respondents to point out to the Court any particular wherein appellants failed to meet the requirements of the act, except for the disputed matters of good faith and financial rehabilitation, both of which have been disposed of by the *Bartels* decision.

(c) On Appointment of Trustee.

The question of the appointment of a trustee is material in connection with the consideration of the *Bartels* decision. It will be recalled that on August 29, 1936, the Conciliation

Commissioner appointed a trustee, that this order was reviewed and affirmed by the District Court on December 15, 1936, that no appeal was taken therefrom, but that on January 4, 1937, within the time for appeal, petitioners made application for removal of the trustee and possession of their estate, which was denied on January 11, 1937. On January 15, 1937, petitioners applied to the District Court for reversal of the commissioner's orders, including those of August 29, 1936 and January 11, 1937. On January 29, 1937, petitioners applied to the Conciliation Commissioner for a review of his order of January 11, 1937. On April 13, 1938, after the District Court had delayed action for over a year, petitioners filed a motion to vacate and set aside all orders of the court, referee and Conciliation Commissioner tending to set aside or delay carrying out the provisions of Section 75. On May 10, 1938, the District Court confirmed the Conciliation Commissioner's order of January 11, 1937, in which order the Conciliation Commissioner refused to remove the trustee, and on the same day denied petitioners' petition of January 15, 1937, and motion of April 13, 1938, whereupon this appeal followed.

Since the attempted appointment of a trustee by the Conciliation Commissioner appears from the record to have been premised upon the finding of inability to refinance, its consideration becomes important in connection with the *Bartels* case. In the first place, petitioners earnestly contend that in view of the *Bartels* decision and the other authorities, the appointment of trustee was absolutely void as an act in excess of jurisdiction.

In 15 C. J., Courts, p. 729, Par. 24, the author says:

“Excess of Jurisdiction. Excess of Jurisdiction as distinguished from the entire absence of jurisdiction, means that the act, although within the general power of the judge, is not authorized, and therefore void, with respect to the particular case, because the con-

ditions which alone authorize the exercise of his general power in that particular case are wanting, and hence the judicial power is not in fact lawfully invoked."

Considering this language in the light of the wording of subsection (s), as construed in the case of *Wright v. Vinton Branch*, *supra*, and the *Bartels* case, petitioners believe that where the Conciliation Commissioner is confronted with the mandatory provisions of subsection (s) but arbitrarily refuses to comply with them and appoints a trustee, his act is void as exceeding his jurisdiction and must be held for naught, whether on direct or collateral attack.

In *Wright v. Vinton Branch*, *supra*, the Supreme Court said:

"The entry of the order of reference initiated proceedings designed to move, through the appointment of appraisers, the appraisal, and the referee's order recognizing the debtor's right to possession, to the grant of the stay by the court. Under the Act no further affirmative action by petitioner precedent to his obtaining the stay was necessary. The mortgagee was not obliged to delay his challenge to the validity of the stay and its essential incidents until these officials had complied with the mandatory provisions of the Act."

In the *Bartels* case, *supra*, the Supreme Court said:

"We are not here concerned with questions which may arise in the course of the administration under the statute, but merely with the duty to follow the procedure which the statute defines and the District Court failed to observe. We hold that on his amended petition invoking subsection (s) Bartels was entitled to be adjudged a bankrupt and to have his proceeding for relief entertained and his property dealt with in accordance with that subsection."

Petitioners sincerely contend that the attempted appointment of a trustee was utterly and completely void.

Assuming for the purpose of argument, that the order was not void, but voidable, petitioners submit that their petition of January 4, 1937, constituted an application for a rehearing on the matter of the trustee's appointment, and that, where filed within the thirty day appeal period and before intervening rights could or did vest, it was effective to preserve jurisdiction over the question.

In *Wayne United Gas Co. v. Owens Illinois Glass Co.*, 300 U. S. 131, 57 Sup. Ct. 383, this Court said:

"Bankruptcy court in exercise of sound discretion if no intervening rights will be prejudiced by its action, may grant rehearing on application, diligently made, and rehear case on merits, and even though it reaffirms its former action and refuses to enter decree different from original one, order entered on rehearing is appealable and time for appeal runs from its entry."

Petitioners submit that regardless of whether the order appointing a trustee was voidable or void, the question has been properly presented before both the Circuit Court of Appeals and this Court, and that under the authority of the *Bartels* case, the order of appointment should have been, and should be, set aside.

The Kalb Case.

In *Kalb v. Feuerstein*, 60 Sup. Ct. 343, this Court states with unmistakable clarity that at all times and under all circumstances (except where express permission of the bankruptcy court is obtained) the exclusive jurisdiction over the property of a farmer-debtor rests in the bankruptcy court, and the State courts are powerless to proceed.

In the original decision, the Circuit Court of Appeals had this to say regarding the matter of a stay:

"Appellants assume, erroneously, that the foreclosure sales were prohibited by subsection (o) of Section 75. 11 U. S. C. A. Section 203 (o). The prohibition in sub-

section (o) applied only to a period 'prior to the confirmation or other disposition of the composition or extension proposal', which period expires when the debtor is adjudged a bankrupt. *Hardt v. Kirkpatrick*, 9 Cir., F 2d 875, 898. In this case it expired on December 19, 1934. The 'stay' provided for in subsection (s), as amended, is not an automatic stay, but is a judicial stay, to be granted only upon compliance with specified conditions. Appellants never obtained, and —upon the facts found —were never entitled to any such stay."

It readily appears, then, that the decision of the Circuit Court of Appeals was founded upon the propositions that an adjudication under original subsection (s) of Section 75 constituted a disposition of the proceedings for extension or composition, and that the only stay provided under subsection (s) is a judicial, not an automatic, stay. The fallacy of these propositions is demonstrated in the *Kalb* case in the following language:

"As stated by the Senate Judiciary Committee in reporting these amendments: " * * * subsection (n) brings all of the bankrupt's property, wherever located, under the absolute jurisdiction of the bankruptcy court, where it ought to be * * *

" * * * By reading subsection (n) to (o) as now amended in this bill, it becomes clear that it was the intention of Congress when it passed section 75, that the farmer-debtor and all of his property should come under the jurisdiction of the court of bankruptcy, and that the benefits of the act should extend to the farmer prior to the confirmation of sale, during the period of redemption, and during a moratorium; and that no proceedings after the filing of the petition should be instituted, or if instituted prior to the filing of the petition, should not be maintained in any court, or otherwise.

" * * * In harmony with the general plan of giving the farmer an opportunity of rehabilitation, he was relieved —after filing a petition for composition and extension

—of the necessity of litigation elsewhere and its consequent expense. *This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.*"

In the light of the Kalb decision interpreting Section 75, there can be no doubt but that the provisions of subsections (n) and (o) remain in effect after the farmer-debtor amends his petition asking to be adjudged a bankrupt and after an adjudication pursuant to such request.

The decision of the Circuit Court of Appeals, here in question, holds that the adjudication on December 19, 1934, under the invalid subsection (s) was a disposition of the proceedings for composition or extension and a termination of the stay provided by subsection (o).

This is error for two reasons:

First. Since an adjudication under valid subsection (s) does not terminate the stay provided by subsection (o), certainly an adjudication under invalid (s) can be no more effective.

Second. When an Act of Congress is declared to be unconstitutional, it was unconstitutional from its inception and any actions taken or done thereunder are nullities.

The order of adjudication entered on December 19, 1934, under the unconstitutional subsection (s) was and is a nullity, and as such, ineffective to terminate the proceedings for composition or extension and ineffective to terminate the stay provided by subsection (o).

Petitioners contentions on this point are supported by the decision of this Court in *Union Joint Stock Land Bank v. Byerly*, 60 Sup. Ct. 773. There the debtor, like petitioners here, filed his amended petition for adjudication under original subsection (s), and was so adjudicated

on February 11, 1935. On May 27, 1935, original subsection (s) was held invalid. On August 26, 1935, on application of the debtor himself, the proceeding was dismissed. The language of the opinion, while denying relief to the debtor because he dismissed his proceedings under Section 75, plainly holds that notwithstanding the adjudication under invalid (s), the stay is still in effect so long as the proceedings remain pending.

We quote the material portion of the opinion:

"Exclusive jurisdiction of the debtor and his property vested in the District Court on the filing of the petition. Up to that time jurisdiction of the debtor and the mortgaged property was in the State Court. Without action by the District Court the State Court could not have proceeded further."

"The *termination* of the bankruptcy proceeding restored the jurisdiction and power of the State Court and its further proceedings in the foreclosure suit were not subject to attack in the bankruptcy court.

"Although the State Court's jurisdiction was superseded by that of the bankruptcy court, it again attached *upon the dismissal* of the bankruptcy case, and, thenceforward, as respects the foreclosure suit, and the State Court's procedure, it was as if no bankruptcy case had ever existed." (Italics ours.)

Under this plain language one cannot doubt that in the instant case *where the proceedings were never dismissed*, the exclusive jurisdiction of the petitioners' estate at all times vested in the bankruptcy court and the attempted sales in the State court were void and nullities.

In the light of the *Kalb* case, as further substantiated by the *Byerly* case, it is now settled law that the State courts are without jurisdiction—except upon express permission of the District Court—during the entire pendency of the proceedings in the Bankruptcy Courts, and the de-

cision of *Hardt v. Kirkpatrick*, relied upon by the Circuit Court of Appeals in its decision in the instant case, has been entirely rejected and repudiated on this point.

Conclusion.

Your petitioners herein were and are the owners of the largest and finest farm in Washington County, Oregon. Being victims of the economic depression they sought relief under the Frazier-Lemke Farm Moratorium Act, which was designed and enacted by Congress and sustained by the Supreme Court to give applicants thereunder a breathing spell and an opportunity of financial rehabilitation.

Not only did your petitioners, as required by law, file their original petition, their amended petition, their petition for the benefits of the act and secure their order of reference, but in addition thereto made the following attempts to obtain compliance with the statute by the Conciliation Commissioner and the District Court:

July 15, 1936.—Petitioned for possession of the farm and an accounting for crops removed.

Aug. 8, 1936.—In their reply further and again requested the benefits of the Act as passed by Congress on August 28, 1935.

Jan. 4, 1937.—Petitioned Conciliation Commissioner for possession of the whole of their estate, for an immediate appraisal and permission to amend schedules.

Jan. 15, 1937.—Petitioned District Court for the full benefits of the Frazier-Lemke Act and excepting to all orders theretofore entered in derogation of their rights.

Apr. 13, 1938.—Motion filed in the District Court requesting compliance with the mandatory provisions of the Act and challenging the validity of all orders entered in conflict with such provisions.

On the other hand the respondents have consistently urged upon the District Court and Conciliation Commis-

sioner non-compliance with the Act as shown by the following:

July 24, 1936.—Answer and cross petition of respondents Johnson and The United States National Bank requesting the Conciliation Commissioner that petitioners be held not farmers, that Section 75¹ (s) be held unconstitutional as applied to the land, and for appointment of a trustee.

June 15, 1937.—Answer of Catherine H. Collins requesting District Court for an order holding land free and clear of bankruptcy proceeding, and that Conciliation Commissioner close the proceeding speedily.

July 7, 1937.—Answer of Joseph M. Loomis requesting District Court that his acts be ratified and approved, and that the trustee be allowed additional expenses and attorney fees.

Sept. 1, 1937.—Answer of Mr. M. R. Johnson and The United States National Bank requesting the District Court for an order that land be free of bankruptcy proceeding, that trustee declare dividend and completely close the proceeding.

Feb. 17, 1938.—Motion of Mr. M. R. Johnson and The United States National Bank requesting District Court for an order holding petitioners to be not farmers, that land in schedules to be not in the jurisdiction of District Court, and that Conciliation Commissioner be ordered *to liquidate petitioners in the manner provided by the Bankruptcy laws other than Section 75.*

After six years of litigation the rental stay order has not yet been entered but instead petitioners have had taken from them their farm and home, their bonds, their crops, their live stock, their farming equipment, their furniture and even their bedding. Petitioners' personal property has been *purposely dissipated*. Petitioners have actually and literally been set on the street and reduced to the status of paupers, and in addition have been deprived of six of the most productive years of their lives. Unless

relief is granted it would have been much better as far as the instant case is concerned, had Section (75) never been made law.

Petitioners for six years have struggled to secure the benefit of their legal rights for themselves and their family in the face of unsympathetic lower courts and bitter resistance from opposing moneyed interests. With practically no encouragement through these long years, petitioners refused to give up, but had confidence throughout that justice and right must ultimately prevail. Finally, this Court, in the *Bartels* and *Kalb* decisions, had occasion to pass upon the very matters at stake in petitioners' case, and in so doing vindicated petitioners' position throughout.

The only question remaining is whether petitioners, having finally had available an authoritative and favorable interpretation of the law, must be deprived of the benefits due them because certiorari was once denied them some forty days prior to the entry of the controlling decision in the *Bartels* case. Petitioners cannot believe that where they have so diligently pursued all remedies available, and where sound discretion permits relief to be granted, that they will be deprived of their due. Petitioners respectfully submit that the order complained of should be reversed, with directions to correct the mandate to comply with the law.

Respectfully submitted,

MARTIN J. BERNARDS,

LENA BERNARDS,

Petitioners in pro. per.

WM. LEMKE,

Of Counsel.

APPENDIX.

Section 75, Bankruptcy Act, Agricultural Compositions and Extensions, 11 U. S. C. A., Sec. 203.

Subsection (n).

“The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

“In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. The words ‘period of redemption’ wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on

the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court."

Subsection (o)

"Except upon petition made to and granted by the Judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court.

"(1) Proceedings for any demand, debt, or account, including any money demand;

"(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, recession, or specific performance of any agreement for sale of land or for recovery of possession of land;

"(3) Proceedings to acquire title to land by virtue of any tax sale;

"(4) Proceedings by way of execution, attachment or garnishment;

"(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

"(6) Seizure, distress, sale or other proceeding under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

Subsection (s).

"Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his

property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: *Provided*, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

“(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor, his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

“(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and

control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

“(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided*, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the courts shall, by an order, turn over full possession and title of said

property, free and clear of encumbrances to the debtor: *Provided*, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

“(4) The conciliation commissioner, appointed under subsection (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to—adjudged a bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed \$35 in any case, to be paid out of the bankrupt’s estate. No additional fees or costs of administration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under subsection (s) of section 75 of this Act, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt’s estate. Conciliation commissioners and referees appointed under section 75 of this Act shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such

farmer, under the provisions of this Act. The provisions of this Act shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

“(5) This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court, because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farmer debtor who has filed under the General Bankruptcy Act may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section.

“(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate.

Approved, August 28, 1935.

THE UNITED STATES OF AMERICA,
State of Oregon,
County of Washington, ss:

I, Martin J. Bernards, being first duly sworn depose and say: That I am one of the petitioners herein; that I served the within brief upon A. D. Platt of attorneys for Respondents Johnson and the United States National Bank on August 9, 1940, at Portland, Oregon, by delivering a copy thereof certified to by me as being a true copy, to said A. D. Platt in person; that on said day I likewise served said brief upon William Brewster attorney for Respondent Collins in the same manner; that on the same day I served said brief upon William G. Hare of attorneys for Respondent

Loomis by depositing a copy thereof certified to by me in the United States mails addressed to the said William G. Hare at Hillsboro, Oregon, postage prepaid.

MARTIN J. BERNARDS.

Subscribed and sworn to before me this ninth day of August, 1940.

FRANCES WOODS,
Notary Public for Oregon.
Notary Public for Oregon.

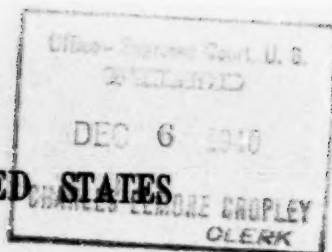
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FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 54 2 1

MARTIN J. BERNARDS AND LENA BERNARDS, His
WIFE,

Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF PORT-
LAND (OREGON), AND JOSEPH M. LOOMIS, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONERS' BRIEF IN REPLY TO BRIEF OF
RESPONDENTS JOHNSON AND LOOMIS.

WILLIAM LEMKE,
Counsel for Petitioners.



INDEX.

TABLE OF CASES CITED.

	Page
<i>Alice State Bank v. Houston Pasture Co.</i> , 247 U. S. 240, 38 Sup. Ct. 496	9
<i>Bronson v. Schulten</i> , 104 U. S. 410	7
<i>Charles Warner Co. v. Independent Pier Co.</i> , 278 U. S. 85, 49 Sup. Ct. 45	8
<i>Fairmont Creamery Co. v. Minnesota</i> , 275 U. S. 70, 72 L. Ed. 168	5
<i>Federal Trade Com. v. Pacific Paper Ass'n</i> , 47 Sup. Ct. 255, 273 U. S. 52	8
<i>Foster Brothers Mfg. Co. v. National Labor Relations Board</i> , 90 F. (2d) 948	6
<i>Hart v. Wiltsee</i> , 25 F. (2d) 63	7
<i>Hubbard v. Todd</i> , 171 U. S. 474, 19 Sup. Ct. 14	9
<i>Reynolds v. Manhattan Trust Co.</i> , 109 Fed. 97	7
<i>Schell v. Dodge</i> , 107 U. S. 629, 27 L. Ed. 601	4
<i>Steele v. Drummond</i> , 275 U. S. 199, 48 Sup. Ct. 53	9
<i>The Maria Martin</i> , 12 Wall. 31, 20 L. Ed. 251	9
<i>Zellerback Paper Co. v. Helvering, Comm'r</i> , 293 U. S. 172, 55 Sup. Ct. 127	8
<i>Webster Co. v. Splittdorf Co.</i> , 264 U. S. 463, 44 Sup. Ct. 342	9
<i>Wright v. Vinton Branch</i> , 300 U. S. 440	11

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**PETITIONERS' BRIEF IN REPLY TO BRIEF OF
RESPONDENTS JOHNSON AND LOOMIS.**

Supplemental Statement of Facts.

In their original brief, petitioners stated the facts in considerable detail. Respondents M. R. Johnson and Joseph M. Loomis have filed their answering brief in which they restate the facts. Petitioners do not propose at this point again to restate the facts in detail, but wish to make the

following comment with respect to certain statements made by respondents:

Respondents state (p. 2) that petitioners purchased the real property in question for the sum of \$45,500. This statement is not in accord with the facts as the purchase price was in excess of \$80,000 (R. 22). Within one year from the issuance of the mortgage petitioners repaid M. R. Johnson approximately \$10,000 on his mortgage (R. 113). Respondents say further that part of the mortgage money was used for the purchase of the bonds of the City of Orenco. This is not true. The Orenco bonds were purchased by moneys derived from the sale of collateral stocks pledged to the First National Bank of Forest Grove, Oregon which collaterals were released by respondent M. R. Johnson for the express purpose of buying the Orenco bonds upon the stipulated agreement that the Orenco bonds would then be pledged to the First National Bank of Forest Grove, upon petitioners' note. This bank note was later assigned to Respondent M. R. Johnson and paid in full (\$10,000) by the funds derived from the sale of petitioners' crops upon wrongful attachment (R. 25-27).

The sale of 165 acres of land for taxes was for a \$70 personal property tax levied against the Oregon Nursery Co., former owner of the land. When brought to the attention of the county court the tax sale was rescinded.

Respondents state (p. 4) that on December 19, 1934 petitioners filed their amended petition asking to be adjudged bankrupts. Particular attention is directed to the fact that this petition was not a petition in general bankruptcy but was a petition for adjudication under Section 75 of the bankruptcy act and stated that petitioners desired to obtain the benefits of that act.

Respondents' statement that a third attempt was made to refer this case to the conciliation commissioner is not

true. The record shows no such petition or order denying it.

In connection with the discussion of petitioners' petition of September 30, 1935 (p. 5-6) attention is directed to the wording of both the petition (R. 16) and the order based thereon (R. 17) indicating beyond question that the nature and purpose of the petition and order was to secure to petitioners the benefits of the amendments to Section 75, approved August 28, 1935 upon the amended petition, and petition for the benefits originally filed under the invalid subsection (s) and then pending in court.

If there is any question about the sufficiency of petitioners' application for the benefits of Section 75 as amended, the petition of February 8, 1935 addressed to the judges of the District Court and the referee praying for appointment of appraisers, appraisal and retention of possession, under the terms of Section 75 (s) leaves no possible doubt on this score (R. 36). This petition was by the clerk of the District Court marked "Filed October 10, 1935 and forwarded to Con. Com." The first hearing held under the amended act was October 21, 1935 (R. 19). In the light of this record, respondents' statement (p. 7-8) that up to July of 1936 petitioners had made no application for relief under the amended act is utterly untrue.

In connection with the chronology of events referred to by respondents, the summary in petitioners' brief (p. 30) surely shows continued and repeated effort on the part of petitioners to obtain compliance with the statute.

With reference to the conciliation commissioner's order of August 8, 1936 (p. 9-10), it should be noted that the so-called determination of the commissioner was a mere recital in the order and at any rate is in obvious contradiction to the record showing ample application for the benefits of the act.

With these comments upon the respondent's statement of facts we proceed to a consideration of the merits of respondents' contentions (Nos. I-IV).

I.

On the Jurisdiction of the Circuit Court of Appeals to Recall and Correct the Mandate.

Respondents concede the general jurisdiction of the court to grant the relief the petitioners ask but contend that the application was not timely. This is the matter dealt with in petitioner's brief under Point II (p. 12-16). It will be noted at once that respondents fail to take cognizance of the controlling factor considered both in the decisions of this Court and the various Circuit Courts of Appeals, namely, whether or not the decision or judgment in question became final during the term in which the same was rendered. Petitioners have heretofore pointed out that the opinion of the Circuit Court of Appeals here in question entered on May 2, 1939, was not a final judgment and could not have become a final judgment until certiorari was denied by this Court on October 23, 1939 (during the succeeding term). When due consideration is accorded this circumstance, respondents' contentions cannot stand, for the very authorities to which they refer clearly indicate that the courts retain jurisdiction over their judgments and orders during the terms in which they become final.

This is the tenor of the authorities referred to in petitioners' original brief and respondents make no effort to meet this fact, but instead try to evade the issue by referring to authorities where the judgments became final in a prior term.

Thus in *Schell v. Dodge*, 107 U. S. 629, 27 L. Ed. 601, quoted by respondents (pp. 14-15) the following language appears in the very quotation used by respondents:

"It has always been held by this Court that it has no power after the term has passed, and a cause has been dismissed or otherwise finally disposed of here to alter its judgment in such a particular as now asked for."

The words "finally disposed of" are the crux of the decision, yet are entirely disregarded by respondents. Respondents state (p. 19) that there were four cases tried together in *Schell v. Dodge*, and that in three of them the mandates were not issued until after the close of the term, and state further that the motion to recall was made during the same term that the mandates were issued. That is a misstatement. While there were four cases tried together originally it was only the *Dodge* case in which a motion to recall the mandate was before the court, and in the *Dodge* case the mandate was issued in the prior term.

In *Fairmont Creamery Company v. Minnesota*, 275 U. S. 70, 72 L. Ed. 168, which is relied upon by respondents, the judgment of this Court was entered on April 11, 1927. No application for rehearing was made. The October 1926 term ended on June 6, 1927 at which time the Court adjourned. The mandate was issued and filed in the Supreme Court of Minnesota on July 27, 1927. Application for correction was made on September 30, 1927. It seems reasonable to assume from the established procedure of this Court that a mandate would not normally be issued so long as more than three months after the decision was rendered, nor that the mandate would have been issued during summer vacation. The mandate thus appears to have been issued prior to the expiration of the term on June 6, 1927. Petitioners submit that the inference is fairly drawn from this decision that had the application for correction been made prior to June 6, 1927, during the term that the mandate must have issued, the application would have been granted.

Petitioners refer to the case of *Foster Brothers Manufacturing Co. v. National Labor Relations Board*, 90 F. (2d) 948 (4th Circuit). This is another case where the facts show that the terms of entry of the judgment and issuance of the mandate had both expired prior to the application for relief and likewise involves a situation where no application for rehearing or other steps to prevent the judgment from becoming final had been taken. We quote from the statement of facts in the opinion :

“On October 8th, 1936 in the October term of this Court, a decree was entered. No petition to rehear was filed. No request that mandate be stayed. Mandate issued on November 9th, 1936. At that time the October term of Court had adjourned. Since then a special November term of the Court and a January and April terms have been held. After the adjournment of all of these terms and more than six months after the issuance of the mandate to wit on May 11, 1937, a petition is filed to recall mandate and grant rehearing.”

From these facts it clearly appears that the *Foster* case was totally dissimilar from the instant case in at least two vital respects. Attention is called to the quotation from the opinion of that case set out in respondents' brief (p. 17) specifically indicating that if jurisdiction is retained over the cause in some appropriate manner the application may be entertained. It should be noted, too, that in the *Foster* case the Court was in the position of a court of original jurisdiction, whereas in the instant case the Circuit Court of Appeals was in the position of a court of appellate jurisdiction. The Circuit Court of the Fourth Circuit pointed out in the opinion that it is well settled, that, after the expiration of the term at which a judgment or decree was entered, a court of original jurisdiction is without power to set it aside.

In *Reynolds v. Manhattan Trust Company*, 109 Fed. 97 (8th Circuit) relied upon in respondents' brief (p. 17) the judgment had become final during the preceding term because, as respondents point out, no application for certiorari had been made. Then, too, as is true in the following case of *Hart v. Wiltsee*, 25 F. (2d) page 63 (1st Circuit), no application was made to this Court to review the order of the Circuit Court of Appeals denying the application to recall the mandate. It thus follows that the *Reynolds* case is distinguishable from the instant case on the matter of the finality of the judgment, and the *Hart* case is contrary to the decisions of this Court in the *Dodge*, *Fairmont Creamery*, and *Bronson* cases and should be expressly overruled.

The balance of respondents' argument, in this connection, is directed to the authorities referred to in petitioners' brief. Petitioners submit that respondents have wholly failed to show that these authorities are not applicable.

In conclusion petitioners point out that respondents avoid any comment upon the proposition that a mandate is an order of the Court over which it retains control throughout the term, in accordance with the following language of this Court in the case of *Bronson v. Schulten*, 104 U. S. 410:

"It is a general rule of law that all the judgments, decrees, or other orders of the Courts however conclusive in their character are under the control of the Court which pronounces them during the term at which they are rendered or entered of record, and may then be set aside, vacated, or modified by that Court."

II and III—(1).

On Petitioners' Motion Not to be Taken as an Application for Leave to File a Bill of Review or Petition for Rehearing in the District Court and on Res Adjudicata.

These contentions of respondents are not before this Court for consideration, for the reason that no such points were

considered by the court below, nor were they suggested either in the petition for certiorari or in any response thereto.

We quote from previous decisions of this Court:

Zellerback Paper Co. v. Helvering, Commissioner of Internal Revenue, 55 S. Ct. 127, 293 U. S. 172:

"One other contention of the government is stated merely to exclude it from the scope of our decision. The government makes the point that the petitioners' return even if filed at the proper time, must be held to be a nullity for the reason that it commingles the income of the affiliated companies, parent, and subsidiary, with that of another company the A. S. Hopkins Co. previously dissolved.

"No such point was considered by the court below, nor was it suggested either in the petition for certiorari or in any response thereto, Review by this court will be limited accordingly."

Charles Warner C. v. Independent Pier Co. Same v. Gulf-trade, 49 S. Ct. 45, 278 U. S. 85:

"Objections to the decree below were offered by counsel for respondents in their briefs and arguments here. But no application for certiorari was made in their behalf and we confine our consideration to errors assigned by the petitioner."

Federal Trade Com. v. Pacific Paper Assn. 47 S. Ct. 255, 273 U. S. 52:

"Respondents, notwithstanding their failure to petition for certiorari, now ask for reversal of that part of the decree which leaves in force part of paragraph (e) and paragraphs (g) and (h). A party who has not sought review by appeal or writ of error will not be heard in an appellate court to question the correctness of the decree of the lower court. This is so well settled that citation is not necessary. The respondents are not

entitled as of right to have that part of the decree reviewed."

See also:

Steele v. Drummond, 275 U. S. 199, 48 S. Ct. 53;

Webster Co. v. Splitdorf Co., 264 U. S. 463, 44 S. Ct. 342;

Alice State Bank v. Houston Pasture Co., 247 U. S. 240,
38 S. Ct. 496;

Hubbard v. Todd, 171 U. S. 474, 19 S. Ct. 14;

The Maria Martin, 12 Wall. 31-40, 20 L. Ed. 251.

III—(2).

On Validity of the Foreclosure Sale.

Respondents' contend, in this connection, that the order of adjudication entered upon petitioners' amended petition under original subsection (s) constituted an adjudication in general bankruptcy. This contention is utterly absurd. An adjudication proceeds from the petition filed. Petitioners were farmers and could not have been adjudicated bankrupts in general bankruptcy against their will. Certainly petitioners' petition for adjudication, under a particular section of the Bankruptcy Act, together with an application for the benefits of that particular section, can by no means be taken as a petition for an adjudication in general bankruptcy. And, furthermore, subsection (c) of Section 75 provides:

"If any such petition is filed, an order of adjudication shall not be entered except as provided herein-after in this section."

The very language of the petition quoted by respondents (p. 32) discloses beyond cavil that the sole purpose of the petition was to secure the benefits of Section 75 of the Bankruptcy Act.

Since the section of the law upon which the order of adjudication was based was subsequently held invalid, it seems clear that the order of adjudication was a nullity for all purposes and left the proceedings in the same condition as if no order of adjudication whatsoever had been entered. In the light of these circumstances, any attempted distinction between the instant case and the *Byerly* case is fancied rather than real. And under the authority of the *Byerly* case, as quoted in petitioners' brief (p. 29), the existence of the stay under the act in the instant case seems indisputable where the proceedings remained pending at the time of the attempted sales of real property.

Accordingly, respondents' contentions in connection with the matter of the right of redemption under the Oregon statutes are beside the point for petitioners could not have been reduced to a right of redemption, unless there were valid sales.

Respondents contend (pp. 41-44) that petitioners failed to make application for the benefits of subsection (s) as amended. Petitioners believe respondents' contention in this connection to be purely captious and entirely lacking in substance. The record discloses ample evidence of adequate application by petitioners. After approval of the amended subsection (s) on August 28, 1935, there was forwarded to the conciliation commissioner on October 10, 1935, among other documents, petitioners' petition for the benefits of the original subsection (s). Paragraph 5 of amended subsection (s) specifically provides that:

"This act shall be held to apply to all existing cases now pending in any Federal Court under this Act as well as to future cases."

Petitioners believe that when this petition was thus presented to the conciliation commissioner prior to the first hearing on October 21, 1935, it constituted a sufficient

request for the benefits of the amended Act, approved August 28, 1935 specially since this presentation was ordered by the District Court. Attention is further directed to petitioners' petition of September 30, 1935 (R. 16), which in and of itself adequately indicates petitioners' intention and request to proceed under the amended Act of August 28, 1935, upon their amended petition, and petition for the benefits both of which were originally filed under the invalid subsection (s) and then pending in court.

The conciliation commissioner accepted this amended petition as proper under the new subsection (s) approved August 28, 1935 for he seized the personal property listed in its schedules, but he refused to accept the petition for the benefits, holding that it was not a proper request under the new act. Petitioners submit that either both petitions were valid or both petitions were void. And, furthermore, the very amended petition upon which the conciliation commissioner exercised jurisdiction contains within itself a request for the benefits.

Further arguments on this subject would seem to be foreclosed by the opinion of this Court in the case of *Wright v. Vinton Branch*, 300 U. S. 440, quoted from by petitioners in their original brief (p. 25) wherein it is specifically held that after the entry of the order of reference no further affirmative action by petitioner precedent to his obtaining the stay was necessary. Petitioners' order of reference was entered on October 15, 1935.

III—(3).

On the Appointment of a Trustee and the Sale of Personal Property.

We have heretofore seen that respondents' contentions with respect to the validity of the sale of real property and

with respect to the insufficiency of petitioners' application for the benefits of the Act, are entirely unfounded.

It therefore follows that respondents' argument in connection with the propriety of the acts of the referee is based wholly upon false premises, and has no application. Petitioners pointed out in their original brief that this Court, in the *Wright* and *Bartels* cases, specifically held that the duty of the referee to proceed to give the farmers-debtors the benefits of the Act was *mandatory*. It is this very failure of the referee to perform his duty and comply with the mandate of the statute of which petitioners here complain.

Petitioners further complained that should this Court hold the order of the District Judge confirming the appointment of a trustee and entered on December 14, 1936 to be voidable; that it is error for the Circuit Court of Appeals to hold this order *res adjudicata*. Petitioners pointed out in their brief (p. 26) that their petition of January 4, 1937 retained jurisdiction of the question, under the authority of the "Wayne" case.

Respondents in their brief (p. 30) contend that the instant case did not come within the exception laid down in the "Wayne" case because the petition of January 4, 1937, was not "entertained". The language of this Court in the "Wayne" case reads as follows:

"Bankruptcy court in exercise of sound discretion if no intervening rights will be prejudiced by its action, may grant rehearing on application, diligently made, and rehear case on merits, and even though it reaffirms its former action and refuses to enter decree different from original one, order entered on rehearing is appealable and time for appeal runs from its entry."

In the instant case an application for rehearing was diligently made, case was reheard on merits on January 11, 1937, and the referee refused to enter decree different from

original one. Petitioners submit that their petition of January 4, 1937 was reheard on merits and comes within the rule.

IV.

(1) **The Bartels Case.**

In their discussions of the *Bartels* case, respondents practically concede the effect of that decision as demonstrating the error in the opinion of the Circuit Court of Appeals, wherein that court held that petitioners had not made a good faith proposal and were financially unable to rehabilitate themselves. Respondents expressly rely upon *res adjudicata* in support of the decision of the Circuit Court of Appeals which was not relied upon by the court itself and which contention is not before this Court upon certiorari.

The matter of good faith and ability to rehabilitate are fully disposed of in the *Bartels* case and must be eliminated as any basis for upholding the decision of the Circuit Court of Appeals.

(2) **The Kalb Case.**

Respondents seek to limit the language of the *Kalb* decision to a proceeding for composition and extension subsections (a) to (r). The language of the opinion is not capable of such a narrow application for it expressly provides

“In harmony with the general plan of giving the farmer an opportunity of rehabilitation, he was relieved—after filing a petition for composition and extension—of the necessity of litigation elsewhere and its consequent expense. This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.”

The opinion did not say that the farmer was relieved only until he amended the petition under subsection (s).

The farmer is relieved and the State courts are stayed under the *Kalb* decision from the filing of the farmer's original petition and as long as his petition remains pending in either its original or amended form. The *Kalb* case is applicable to the instant case because petitioners filed their original petition on August 10, 1934 and it remained pending in its original form until September 30, 1935, and has been pending since then in its amended form.

(3) The Byerly Case.

As hereinbefore pointed out, petitioners believe that respondents' attempts to distinguish the *Byerly* case from the instant case are wholly ineffectual. Certainly Byerly's amended petition invoking original subsection (s) had the same effect as the amended petition and order of adjudication in the instant case. And if there was a stay in effect in the *Byerly* case after the invalidation of former subsection (s), then it must follow that there was a stay in effect in the instant case after the invalidation of former subsection (s).

(4) The Borchard Case.

Respondents accord the *Borchard* case but scant consideration. However, petitioners believe that the language of the opinion referred to in the original brief (pp. 21-22) has a specific application to the instant case particularly as showing that the petitioners are entitled to a compliance with the procedure required by the statute.

Conclusion.

In conclusion, petitioners respectfully submit that the respondents have failed to meet or refute the arguments advanced in petitioners' original brief and that as therein

pointed out their application for relief to the Circuit Court of Appeals was timely, was meritorious, and was within the power of the court to grant and that under all of these circumstances and under the controlling decisions, it was a clear abuse of discretion on the part of the Circuit Court of Appeals to deny the application.

WM. LEMKE,
Counsel for Petitioner

(1169)



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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PETITIONERS' SUPPLEMENTAL BRIEF.

Summary of Procedure.

On August 10th, 1934 petitioners filed their petition for composition and extension of time under Section 75 (s) of the Bankruptcy Act (R. 1). On December 17th, 1934 the Conciliation Commissioner reported that the petitioners were unable to get a composition or extension of time from the majority creditor, M. R. Johnson (R. 8). On December 19th, 1934 the petitioners amended their petition asking to be adjudged bankrupts under old Section 75 (s) and on the same date they were adjudged bankrupts under old Section 75 (s) (R. 9 and R. 13 and 14). On December 20th, 1934 all the proceedings had heretofore were referred by the United

States District Court to Willard L. Marks, Referee in Bankruptcy, in accordance with the provisions of old Section 75 (s) (R. 14).

Petitioners Asked Benefits Under Old Section 75 (s).

On February 8th, 1935 the petitioners demanded the benefits under old Section 75 (s) in the following language:

“That your petitioners desire that all of the property owned by them and described in their schedules attached to the amended petition, whether pledged, encumbered or unencumbered by liens, or otherwise, be appraised, and that appraisers be appointed to make such appraisal; and that your petitioners be allowed to retain possession of all of said real and personal property and pay for the same under the terms and conditions set forth in subsection (s) of Section 75 of the Bankruptcy Act:

Wherefore, Your Petitioners pray that appraisers be appointed herein for the appraisal of all of the property of the bankrupts, whether pledged, encumbered or unencumbered by liens, or otherwise, and that the petitioners be allowed to retain possession of all of their property and pay for the same under the terms and conditions set forth in subsection (s) of Section 75 of the National Bankruptcy Act; and that petitioners be granted such other and further relief as may be necessary, appropriate and equitable herein (R. 36 and 37).

On May 27th, 1935 this Court held old Section 75 (s) unconstitutional in the *Radford* case, 295 U. S. 555. On August 28th, 1935 the President signed and approved the new Section 75 (s).

Status of Proceedings.

What was the status of the petitioners' proceedings when the old 75 (s) was held unconstitutional? They had asked to be adjudged bankrupts and were adjudged bankrupts

under old 75 (s). They had not asked to be adjudged bankrupts under the general law and being farmers could not be adjudged involuntary bankrupts under the general Bankruptcy Act.

It is our contention that when old 75 (s) was held unconstitutional all proceedings under it were suspended and the farmer-debtors found themselves again under Section 75 (a-r). They filed under Section 75 (a-r) to begin with and their case was never dismissed. It is true they attempted to get under old 75 (s) but their endeavor failed when that was held unconstitutional.

New 75 (s).

As we have seen the new 75 (s) was passed and became a law on August 28th, 1935 while petitioners' proceedings were still pending under Section 75 (a-r), or if we are mistaken in that they were at least pending somewhere under the Bankruptcy Act. One thing is sure—they were not dismissed. The new 75 (s) contains the following paragraph:

“(5) This Act shall be held to apply to all existing cases now pending in any Federal court; under this Act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fee or charges.

Any farm debtor who has filed under the General Bankruptcy Act may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section.”

Since at the time of the enactment of the new 75 (s) this case was still pending in the District Court, the new 75 (s) revived the proceedings had under old 75 (s). The lan-

guage of the statute itself is clear and unmistakable. Congress intended to and did protect the cases that had been started and that had temporarily fallen by the wayside with old 75 (s). There could be no other reason for putting the words "This Act shall apply to all existing cases now pending in any Federal Court, under this Act, as well as future cases," into new 75 (s). Congress expressly revived the proceedings under old 75 (s) by unmistakable language in new 75 (s).

Intervening Rights.

When Congress reenacted subsection (s) and provided that "This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases, and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges."

By that language Congress had reference to and intent to revive the proceedings in cases pending and to reinstate the proceedings in cases that were dismissed. It did not intend to interfere with constitutional intervening rights. Of course, if in any such case while it was dismissed the farmer-debtor lost all interest and title then the Court also lost jurisdiction, in that particular case, when it was reinstated.

In this case there are no intervening rights.

Petitioners Act Promptly.

On September 30th, 1935, petitioners, after reciting proceedings had under Section 75 (s), including old 75 (s), asked the Bankruptcy Court that all of the proceedings had and all of the documents and records in possession of the Referee be transferred to the Conciliation Commissioner in

accordance with new 75 (s), approved August 28th, 1935 (R. 16).

It is undisputed that among these documents and records was the amended petition of December 19th, 1934, and the order adjudging petitioners bankrupt under old 75 (s) (R. 9 and R. 13 and 14). It is equally undisputed that among these documents and records was the petition of February 8th, 1935, in which the petitioners asked for the benefits of old 75 (s) and asked specifically that an appraisal be authorized and that they be given possession of their property in accordance with provisions of Section 75 (s) (R. 36).

On the same date, September 30th, 1935, the United States District Court, after reciting the fact that the petitioners had been adjudged bankrupts and that the powers of the Conciliation Commission had been enlarged under new 75 (s) made the following order:

“Be it Therefore Ordered that the order of reference heretofore made to Willard L. Marks, Referee in Bankruptcy, be and the same is hereby recalled, and that said Referee in Bankruptcy be and he is hereby authorized and directed to transmit to this Court all records, documents, and proceedings in the matter of the estates of the above-named bankrupts now in his possession, and prepare and file with this Court a report of all proceedings had before him up to the time of transfer; and

Be it Further Ordered that said proceedings be referred to H. A. Kuratli, Conciliation Commissioner of the County of Washington in the State and District of Oregon” (R. 18).

Respondents did not appeal from the above order granting petitioners' petition of September 30th, 1935, nor would an appeal have been successful. This petition asked the revival of the proceedings had under old 75 (s). When old 75 (s) was held unconstitutional the proceedings became dormant until they were revived by the Congressional Act.

Since this case was never dismissed but remained pending at all times in a court of bankruptcy, there could have been and were no intervening rights.

All of petitioners' property was under the sole and absolute jurisdiction of the Court in Bankruptcy. The proceedings in the State court were void; they were without authority and without jurisdiction. But even if the unwarranted sales could by any imagination be given vitality, then nevertheless, when the new 75 (s) was passed and the petition of September 30th, 1935, was granted, the period of redemption had not run in either of the foreclosure sales.

In the case of M. R. Johnson the so-called period of redemption under the void sale did not expire until June 29th, 1936, and the period of redemption in the Collins' void foreclosure sale did not expire until August 26th, 1936. We say void sale because the State court had no jurisdiction. The proceedings were pending in the Bankruptcy Court. Under the Oregon law the period of redemption is one year from the date of sale. *Kalb v. Feuerstein*, 60 Sup. Ct. 343.

Even before the above cases and before Section 75 of the Bankruptcy Act was passed the courts universally held that there was no divided jurisdiction over the bankrupt property between the Federal Courts of Bankruptcy and the State Courts.

"Upon adjudication of bankruptcy, title to all the property of the bankrupt, wherever situated, vests in the trustee as of the date of filing the petition in bankruptcy. The bankruptcy court has exclusive jurisdiction, and that court's possession and control of the estate can not be affected by proceedings in other courts, State or Federal. Isaacs v. Hobbs Tie & T. Co., 282 U. S. 734, 737 and cases cited. Such jurisdiction having attached control of the administration of the estate can not be surrendered even by the court itself. Id., 739. The filing of the petition is a caveat to all the world and in fact an attachment and an injunction.

May v. Henderson, 268 U. S. 111, 117. Gross v. Irving Trust Co., 289 U. S. 342."

All of the subsections from a to s inclusive of 75 must be construed together as one act. The argument that the stay of Section 75 (o) applies only to proceedings of (a) and (r) is absurd. The stay is statutory and not judicial. The jurisdiction is in the Federal Court and can not be usurped by State courts.

Cannot Surrender Jurisdiction.

"For the Court to afford the relief which the section as amended contemplates, it is necessary that the *exclusive and paramount jurisdiction* of the court over the *property* of the bankrupt be *maintained*; and there can be no question but that the provisions of subsections (n) and (o) apply as well to proceedings continued under subsection (s) as to proceedings under the other provisions of section 75. * * * And we do not think that the right to stay proceedings in the State court is precluded because a sale has taken place in foreclosure proceedings if there has been no confirmation of the sale" Bradford v. Fahey, 76 F. (2d) 628 (C. C. A. 4th.)"

In the case of *In re O'Brien*, C. C. A. 2, 78 D 92d) 715, the court held the lien to be void saying:

"On the face of the statute *it is entirely clear* that Congress *intended* the bankruptcy court to have *exclusive* jurisdiction over the farmer's property *from the moment he should file a petition* for relief under section 75. This is *inferentially* shown by the final sentence of subsection (e), Section 75, and is *expressly stated* in subsection (n), Section 75. * * *

* * * * *

"And subsection (o), Section 75, *specifically* declares that neither proceedings affecting title nor proceedings for the recovery of any debt *shall be instituted*, or, if already instituted, *maintained* against the farmer or his property at any time *after the filing of the petition*

and prior to the confirmation or other disposition by the court of the composition or extension proposal. These provisions put it beyond debate that after the filing of the farmer's petition no creditor was to be permitted to better his position by litigation in another court. See *Bradford v. Fahey* (C. C. A. 4th Cir.) 76 F. (2d) 628, 637; *In re Dickinson* (D. C. Wyo.) 9 F. Supp. 227, 229; *Eaves v. Glenn* (D. C. Tex.) 9 F. Supp. 647, 648. Hence the bank's judgment improperly taken after O'Brien had filed his petition in the Court below cannot impose any valid lien on the debtor's property."

In the cases of *Borchard et al. v. Bank of California et al.*, 60 Sup. Ct. 957; *John Hancock Mutual Life Ins. Co. v. Bartels*, 308 U. S. 180, 60 Sup. Ct. 221; *Kalb v. Feuerstein*, 60 Sup. Ct. 348; *Union Joint Stock Land Bank v. Byerly* 60 Ct. 773, this Court has in effect reversed every position upon which the court below based its erroneous decision. It has reversed the idea that the farmer must convince the court that he is able to rehabilitate himself within three years. It has reversed the idea that the stay in Section 75 is judicial and not mandatory. In these cases this Court has clearly interpreted the spirit and intent of Congress. It has clearly interpreted the statute by holding that any proceeding in a State court while a case is pending in a Federal court is void.

History. ¶

Section 75 of the Bankruptcy Act was originally passed in the closing days of the Hoover Administration, in March, 1933. The present Frazier-Lemke Amendments were added and became a law on August 28th, 1935. Contrary to the general belief, the Frazier-Lemke Amendments did not only add subsection (s) but also amended existing subsections (b) (j) (k) (n) and (p) of Section 75, as well as amending old subsection (s).

Therefore it is clear that Congress considered Section 75 as one and a complete Act. It did not consider every

subsection an independent Act. Every subsection of Section 75 of the Bankruptcy Act must be construed in conjunction and harmony with every other subsection including subsections (o) and (s). The whole section must be given full force and effect. That was the intent of Congress.

Recall of Mandate.

In the case at bar the Circuit Court of Appeals issued an order staying the mandate pending the decision of this Court on the petitioners' petition for writ of certiorari (R. 158). This Court denied that petition on October 23rd, 1939, but that had taken the Circuit Court into another term of court. Then on November 4th, 1939, the petitioners filed a motion in the Circuit Court of Appeals to recall and withhold the mandate pending the decision of this Court in the *Bartels* case (R. 159). That petition the Circuit Court denied November 6th, 1939 (R. 160).

On December 4th, 1939, this Court decided the *Bartels* case. In that case this Court decided all of the material issues in petitioners' case in their favor. Thereupon on January 2nd, 1940, petitioners filed a motion for recall and correction of the mandate (R. 160).

Thereupon respondents on January 12th, 1940, filed a motion to dismiss petitioners' motion for recall and correction of the mandate (R. 161). On March 22nd, 1940, the Circuit Court of Appeals denied petitioners' motion, but it did not dismiss it as requested by respondents (R. 162). From this it is clear that the court retained jurisdiction of the mandate.

The motion to recall or vacate the mandate was made during the same term that the mandate was issued. Consequently this Court has jurisdiction to correct the erroneous decision of the Circuit Court when it denied petitioners' motion of January 2nd, 1940, and refused to correct its erroneous decision theretofore made.

Cases Cited by Respondents.

We have again looked over the decisions cited by respondents in support of their position but find that the cases they cite are not in point. In all of the cases they cited the judgments had become final, and both the decision and mandate had been issued in a prior term.

We have again read the *Schell v. Dodge* case and are not certain just when the mandate did issue in that case, whether it was at the prior term of court or not, but we are certain that that case has no application to the present case. In that case there was no petition for certiorari pending, the judgment had become final. There this Court was asked to change its own decision at a later term of the Court.

We wish to call the Court's attention, however, to the case of the *Missouri Pacific R. R. v. Norwood*, 283 U. S. 249, in which this Court affirmed the Circuit Court of Appeals on April 13th, 1931. Then on June 1st, 1931, this Court did not hesitate to modify its judgment. 283 U. S. 809.

Conclusion.

In conclusion permit us to suggest that while respondents complain of delay on the part of petitioners yet the record is complete and shows that the petitioners endeavored from the very outset to get an appraisal of the property and retain possession. This request was repeatedly made by petition, as is shown by the transcript of the record. "February 8th, 1935, R. 36, October 1st, 1936, R. 19, August 8th, 1936, R. 22, January 4th, 1937, R. 25, January 13th, 1937, R. 31, January 15, 1937, R. 77, January 29th, 1937, R. 33 and August 13th, 1938, R. 34."

The record shows that in every instance the respondents opposed and succeeded in blocking the petitioners from getting and enjoying the benefits of Section 75 in accordance with the intent of Congress. They refused a composition

and extension of time and opposed the appraisal and the giving of possession to petitioners (R. 8 and 9). They succeeded in getting a trustee appointed instead (R. 54-57). They proceeded in violation of Section 75 and without jurisdiction with foreclosure in the State court in order to deprive the petitioners of their property and having obtained a void deed from the State court attempted to get it validated by having the Federal court quiet title in them (court's findings of fact, R. 64-74).

The proceeding here is under Section 75 of the Bankruptcy Act. The United States District Court sat as a court of equity and the general principles that, "He who seeks equity must do equity," or "He who comes into equity must come with clean hands," applies. The attempt to get something for nothing at the expense of another, because of legal technicalities, never has and never will succeed in a court of equity.

"Equity regards substance and not form." "It regards that done which ought to have been done." In short a court of equity uses common horse sense and does justice between the parties on the broad principles of right and wrong. We concede that it does this within well-established rules of practice and procedure.

We respectfully submit that the Circuit Court of Appeals erred in confirming the decision of the District Court in the two orders entered on May 10th, 1938 (R. 51-57), in which the District Court considered the petitioners' petition and denied petitioners the benefit of Section 75, and erroneously attempted to quiet title in the respondents (R. 64-74 and R. 37-39).

Respectfully submitted,

WM. LEMKE.



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117

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 2

MARTIN J. BERNARDS AND LENA BERNARDS,
Petitioners,
vs.

M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF PORT-
LAND AND JOSEPH H. LOOMIS, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

SUMMARY BRIEF FOR PETITIONERS ON
REARGUMENT.

WILLIAM LEMKE,
Counsel for Petitioners.

INDEX.

SUBJECT INDEX.

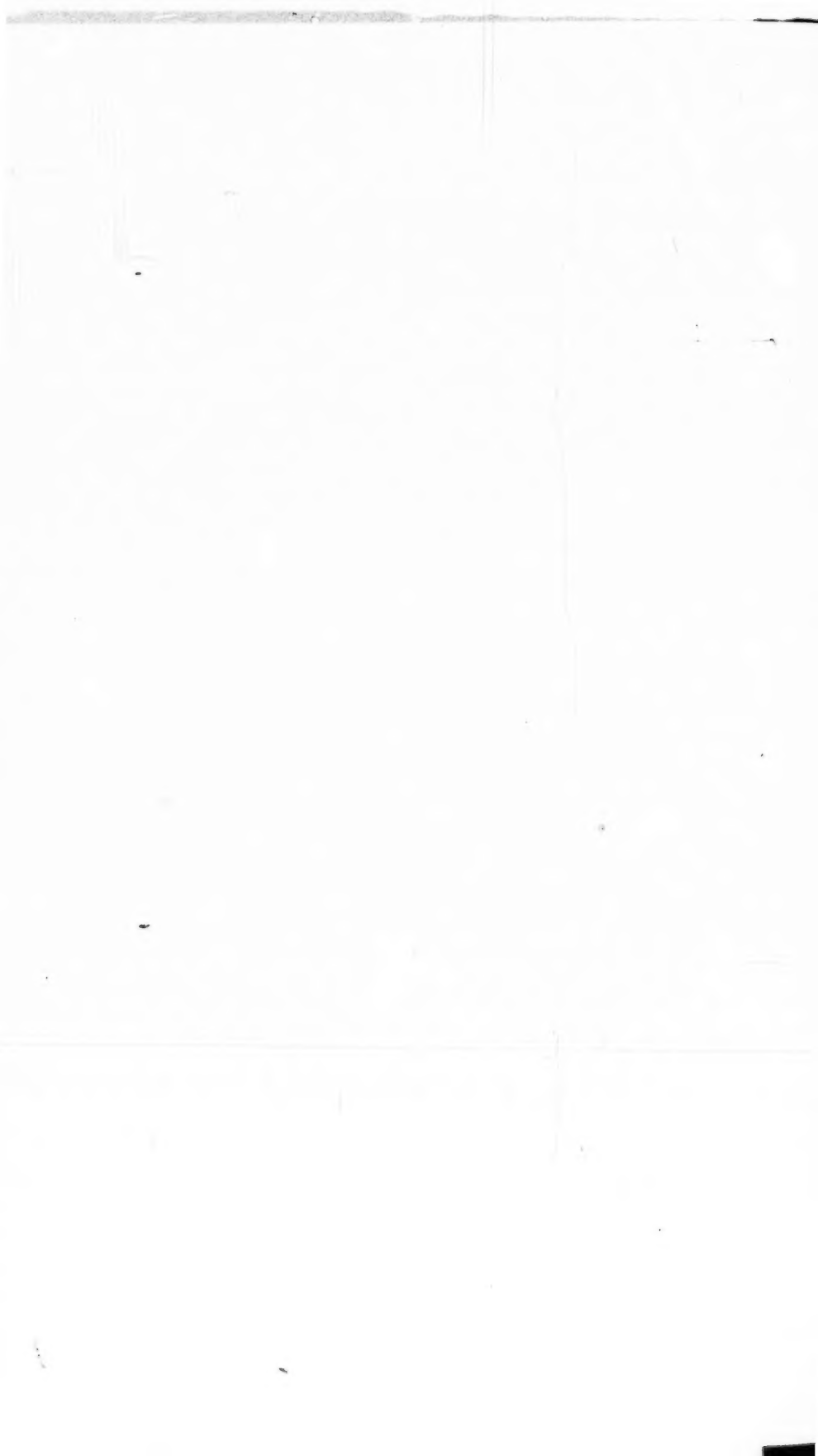
	Page
Summary of appellants' briefs	1
Procedure	1
Status of bankrupts	3
Sole jurisdiction	4
Could have saved time	5
Res adjudicata	6
Recall of mandate	7
This Court retained jurisdiction	8
Findings of fact	9
Conclusion	10

TABLE OF CASES CITED.

<i>Bradford v. Fahey</i> , 76 F. (2d) 628	5
<i>Gross v. Irving Trust Co.</i> , 289 U. S. 432	5
<i>Gypsy v. Escoe</i> , 275 U. S. 498	7
<i>John Hancock Mutual Life Ins. Co. v. Bartels</i> , 308 U. S. 180	8
<i>Kalb v. Feuerstein</i> , 308 U. S. 433	4
<i>Sandusky v. National Bank</i> , 23 Wall. 289	6
<i>Wayne v. Owens-Illinois</i> , 300 U. S. 131	6
<i>Wright v. Union Central Life</i> , 304 U. S. 502	6

CONGRESSIONAL REPORTS CITED.

House Report, No. 1808	10
Senate Report, 74th Congress, 1st Session, No. 985	10
Senate Report, 76th Congress, 1st Session, No. 1045	10



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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

SUMMARY OF APPELLANTS' BRIEFS.

Since appellants have filed several briefs in this case, we will endeavor to give a brief summary of the material facts, and the questions of law involved, which we feel are necessary for the Court to consider in the final disposition of this case.

Procedure.

On August 10th, 1934, appellants filed their petition under Section 75 of the Bankruptcy Act (R. 1, 2). On

December 4th, 1934, the respondents rejected appellants' proposal for composition and extension of time (R. 8, 9). Thereupon, on December 19th, 1934, appellants amended their petition and proceeded under old 75s (R. 9 to 11).

On February 8th, 1935, appellants petitioned the court for an appraisal of all their property, and that they be allowed to retain possession under the provisions of 75s (R. 36, 37). This petition became a part of the amended petition. "Such farmer may at *the same time, or at the time of the first hearing*, petition the court that all of his property * * * be appraised * * * and be set aside to him and that he be allowed to retain possession under the supervision and control of the court, * * *" (75s). Upon this request the referee appointed appraisers on May 21st, 1935 (R. 15, 16).

On May 27th, 1935, the Supreme Court of the United States held old subsection 75s unconstitutional in the *Radford* case, 295 U. S. 555. On August 28th, 1935, the President signed and approved the new subsection 75s. On Sept. 30, 1935, appellants petitioned the District Court that *all* of the records, documents and proceedings had under old 75s be recalled from the referee and referred to the conciliation commissioner in accordance with the provisions of the new 75s (R. 16, 17).

On the same day, September 30th, 1935, the District Court ordered the referee in bankruptcy to transmit to the court *all records, documents* and proceedings in the matter of the estate of the appellant bankrupts, and ordered him to report all proceedings had before him as referee (R. 17, 18). On October 15th, 1935, the court issued its order formally transferring *all* of the *records, documents* and proceedings in the appellants' case to the conciliation commissioner (R. 19). *Among these records and documents was the above petition asking for an appraisal.*

Full Compliance.

This was a full compliance by appellants with the provisions of the new 75s. It was a reinstatement of appellants' case under the new 75s, together with *all records, documents and proceedings theretofore had under old 75s. It was a reinstatement—a resurrection of appellants' rights to save their farm and home for themselves and family under the direction of an Act of Congress.*

“(5) This act shall be held to apply to *all existing cases now pending in any Federal court*; under this act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, *shall be promptly reinstated* without any additional filing fee or charges.” (New 75s.)

Appellants' case was pending. It was not dismissed. The District Court, the conciliation commissioner, the appellants and the respondents all treated and considered the transfer of all the records, documents and proceedings from the referee to the conciliation commissioner as a complete and full reinstatement of appellants' case under the new 75s.

Status of Bankrupts.

There is some question as to what was the status of appellants' case during the time that the old 75s was held unconstitutional and the enactment of the new 75s. They had asked to be adjudged bankrupts and were adjudged bankrupts under old 75s. They had not asked to be adjudged bankrupts under the general law, and being farmers could not be adjudged involuntary bankrupts under the general act. The District Court in its reinstatement of the case *treated the adjudication as of December 19th, 1934*, being the date of adjudication under old 75s (R. 19).

It is appellants' contention that when old 75s was held unconstitutional, they found themselves not only again under section 75 (a to r) but that as a matter of law they had always been under section 75 (a to r). This on the theory that when an act is held unconstitutional every step taken under it is a nullity. They had filed under section 75 (a to r) to begin with and their case *was never dismissed*.

It is true they had attempted to get under old 75s, but their endeavor failed when that subsection was held unconstitutional. There never was a legal old 75s, and appellants' attempt to amend their petition under old 75s became for the time being a useless act. *It took an act of Congress to give that proceeding life and vitality*. We submit that appellants were at that time, and until they were reinstated under new 75s, under section 75 (a to r).

Sole Jurisdiction.

From August 10th, 1934, the day that appellants filed their petition, and until they were reinstated under the new section 75s on September 30th, 1935, *all their property was under the sole jurisdiction of the Federal Court* under the provisions of section 75 (a to r). After they were reinstated they continued under the *sole jurisdiction* of the Federal court under new 75s. Any proceeding in any State courts after August 10th, 1934, *is and was absolutely void*. *Kalb v. Feuerstein*, 308 U. S. 433.

The District Judge's attempt to confirm a void foreclosure sale, by dissolving the restraining order against the sheriff on the grounds that the sale had been made prior to the order, *cannot change a void sale into a valid sale* (R. 48). The court could not breathe the breath of life into the nostrils of a void sale—a sale that did not exist.

Appellants' property as we have seen was under the sole jurisdiction of the Federal Court from August 10th, 1934, *and is still under that jurisdiction*. *The appellants' peti-*

tion has not yet been dismissed. They are still adjudged bankrupts. The sheriff's sales were held on *May 29th*, 1935, and on *August 26th*, 1935, respectively (R. 80). The appellants had *one year to redeem* under the Oregon law. But upon filing their petition on August 10th, 1934, the foreclosure proceeding begun *was stayed*, and the foreclosure proceeding started after that date *was prohibited* by section 75.

The lower court's inconsistency is seen when on August 31st, 1938, it issued a *Nunc Pro Tunc* order as of February 18, 1935, dissolving the injunction against the respondents on the grounds that appellants' proceeding was under section 75 of the bankruptcy act, subdivisions (a) to (r) inclusive, and that said section *is self executing* and *provides a stay of execution in the State courts*, and that the *restraining order was superfluous* (R. 74, 75).

Could Have Saved Time.

The lower court could have saved itself and this Court a lot of time if it had held *all the proceedings in the State court null and void*. If the Judge had done that he would have performed his duty under section 75. He would not have wrecked a home, and he would also have rendered a service to the respondents, *whether they know it or not*. *They then would have gotten their rental each year, and at the end of three years would have gotten their money, or the value of the property, and more than that they are not entitled to*. The District Court cannot *Nunc Pro Tunc* a void sale into a valid sale. *Gross v. Irving Trust Company*, 289 U. S. 432; *Bradford v. Fahey*, 76 F. (2d) 628 (C. C. A. 4th).

While we feel that the natural sequence, logic and reasoning of our position above cannot be successfully controverted, yet if this Court should hold that the foreclosure sales in the State court were valid, then we submit that

when appellants were reinstated under new subsection (s), on September 30th, 1935, *the period of redemption had not expired, and they were entitled to immediate possession and control of their property.* *Wright v. Union Central Life*, 304 U. S. 502. Section 75n, o, p and s, expressly provide that the farmer debtor shall be protected during the period of redemption, and that the period shall be extended for three years. State court proceedings were stayed, 75 (o). (See also *Kalb case, supra.*)

Res Adjudicata.

The question of *Res Adjudicata* is not in this case. It was not passed upon by the District Court, nor by the Circuit Court of Appeals. *These courts took jurisdiction and passed upon the merits, however erroneous their decisions on the merits may have been. Therefore, that question is not before this Court. It cannot be raised for the first time here.* *Sandusky v. National Bank*, 23 Wall. 289.

Anyway, there is no such thing as *Res Adjudicata* in a bankruptcy proceeding until the case has been finally closed, and the debtor either discharged or his petition dismissed. In the case at bar the appellants' petition is still in full force and effect in the lower court. *The jurisdiction in a bankruptcy proceeding is continuous. There are no terms in a court of bankruptcy. A bankruptcy court can correct its errors, or modify its orders, at any time while the case is still pending.*

"It is true the bankruptcy court applies the doctrines of equity, *but the fact that such a court has no terms, and sits continuously, renders inapplicable the rules with respect to the want of power in a court of equity to vacate a decree after the term at which it was entered has ended.*" *Wayne v. Owens-Illinois*, 300 U. S. 131.

"On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound

discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case on the merits; and even though it reaffirms its former action and refuses to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry." *Wayne* case, *supra*. See also *Gypsy v. Escoe*, 275 U. S. 498.

The District Court in its two orders of May 10th, 1938, which are the subject of this appeal, *did not base its decision on Res Adjudicata, but upon the merits* (R. 37, 38, 39). It made lengthy Findings of Fact (R. 64 to 74). It is true that its Findings of Fact and Conclusions of Law are inaccurate and erroneous, *yet the court reviewed the entire proceedings and passed upon the merits*.

Surely the respondents, *who not only did not object to this procedure, but in fact participated, and asked the court to quiet title in them of appellants' property, are in no position now to talk about Res Adjudicata*. The court obligingly quieted title in them, and they cannot now repudiate the court's erroneous decision. The court had jurisdiction of appellants' motion, as well as of their petition for review of the conciliation commissioner's action. The court passed upon the merits and the correctness of that decision in now before this Court.

Recall of Mandate.

Appellants' application to the Circuit Court to recall and correct the mandate, was made in time, and the Circuit Court erred when it denied the application. The application was made during the same term of court that it was issued. *The Circuit Court of Appeal's term ended October 1st, 1939. The motion to withhold the mandate was made November 4th 1939, and denied November 6th, 1939. That is, the motion to withhold and correct the mandate and*

the denial of that motion, *were both made after the old term ended and the new term began.*

Surely there could have been no final judgment prior to the disposition of that motion. It is also obvious that prior to October 23rd, 1939, there was and could have been no final judgment, because from July 10th until October 23rd, 1939, the case was pending before the Supreme Court of the United States upon a petition for certiorari. *This clearly brought us into the new term of the Circuit Court.*

The Supreme Court denied the petition for certiorari on October 23rd, 1939. On December 4th, 1939, it decided the *Bartels* case. 308 U. S. 180. In which case it disposed of the issues involved in appellants' case in favor of appellants. On January 2nd, 1940, it decided the *Kalb* case, *holding that foreclosure proceedings in the state court were void.* 308 U. S. 433. Thereupon appellants renewed their motion for recall and correction, which motion and petition was again denied by the Circuit Court of Appeals without opinion, March 22nd, 1940.

Thereupon appellants, on April 12th, 1940, renewed their petition before this Court for a writ of certiorari. *This petition was granted, and the writ issued on April 29th, 1940.*

This Court Retained Jurisdiction.

It is our contention that the Supreme Court of the United States did not lose its jurisdiction upon the denial of the first petition for certiorari on October 23rd, 1939. It had jurisdiction to correct and modify this decision, at least in the same term of court. This we maintain it did when it granted the writ upon the second petition, *which involved the same questions of law as the first petition, and was made in regard to the same subject matter.* The Supreme Court not having lost jurisdiction, the Circuit Court, from which the appeal was taken, did not lose jurisdiction. There was no

final judgment then—there is no final judgment now—there will be no final judgment until this Court disposes of the case upon this reargument.

Findings of Fact.

The Findings of Fact of a trial court will be presumed to be correct where there was a trial or hearing before the court, and where oral evidence was given, but not reported. But we maintain that the lower court cannot imagine or manufacture Findings of Fact where the record fairly shows *that there never was any oral testimony given before the court—where there never was a hearing or a trial before or in the presence of the court.*

The Court might also make Findings of Fact upon the review of a hearing had before the conciliation commissioner if the oral testimony has been reduced to writing by a reporter, and after it has been properly identified by the reporter. *But the court cannot base its findings legally upon mere information as to what the testimony was by the conciliation commissioner, or the attorneys for the respondents. That is not legal testimony,* and it is a dangerous procedure if such presumed testimony is given behind closed doors in the court's chambers.

The truth is that there never was any testimony, oral or otherwise given before the court, or to the conciliation commissioner to support some of the findings of fact made by the court. The only evidence that the court had before it was the argument of the attorneys, the petitions and applications of appellants, and the answers, petitions and applications of the respondents, and the records and documents, orders, petitions and applications set out in the record. These we submit do not support some of the Findings of Fact upon which the court based some of its erroneous conclusions of law.

There is nothing in the record that supports Findings number 11, 12, 13, 14, 20 and other findings that we consider immaterial. *We submit that the Findings of Fact must be supported by some evidence in the record.* This because no transcript of any of the evidence taken before the conciliation commissioner was ever made or submitted to the court, and no evidence in fact was ever given before the conciliation commissioner, other than in connection with the question whether or not the appellants were farmers, and *this was not reported or submitted to the court.*

Conclusion.

In conclusion we will state that Congress passed section 75 of the bankruptcy act for the very purpose of protecting the homes and farms of people like the appellants. That is the fixed and the determined policy of Congress as expressed in this act and other acts, and as repeatedly expressed in the House and Senate reports, and in the debates on the floor of the House and the Senate while this act was being considered and passed. Senate report 74th Congress, 1st session, number 985. Senate report, 76th Congress, 1st session, number 1045. House report, number 1808.

Yet for some strange reason appellants were prevented from taking advantage of an act of Congress. The respondents, *by their illegal foreclosure*, the conciliation commissioner, *by his one sided decisions*, and the District Court *by confirming the acts* of the commissioner, prevented the appellants from enjoying the benefits of section 75.

It is true that at times the court hesitated. On one occasion the court is reported to have told the attorneys, "The reason I called you gentlemen into the chambers is because it does not look well for the court to be arguing with attorneys from the bench. I have now made up my mind about the Frazier-Lemke Act. I have crossed the bridge, and I

am not going to turn back. I may be a stubborn darned fool, and then again I may not be. I am holding the Frazier-Lemke act constitutional. *Bernard is a farmer; his petition is in order; he is entitled to the benefits of the act. The proper thing in this case is an order putting the mortgage holder out of there, but I haven't jurisdiction; jurisdiction in the first instance rests with the conciliation commissioner, but if he does not act, or if he refuses to act, then I will act.*" (R. 148).

Not only did the conciliation commissioner not comply with appellants' request and appoint appraisers and protect them in their possession, but he appointed a trustee on September 19, 1936, thus depriving appellants of their property in violation of 75s4. (R. 23) "*If at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this act.*" (75s4)

On July 15th, 1936, appellants again petitioned the conciliation commissioner to oust the trustee and give possession of their lands back to them. (R. 19). They asked that they be given possession and that the estate be administered under the Frazier-Lemke Act. This also was denied them.

We shall not take up more time on this point. The printed record shows that *appellants were not negligent*, but endeavored again and again to have the conciliation commissioner, and the District Court give them the benefits of the Frazier-Lemke Act, *but they met with no success*. That is why we are in this Court, asking that the erroneous decisions of the District and Circuit Court of Appeals be reversed, and appellants be given an opportunity to proceed under section 75.

This summary brief is based upon the authorities and cases cited and arguments made in appellants' briefs heretofore submitted. We feel that this summary will aid the Court in setting together the various facts submitted in the printed record which facts we feel are poorly arranged and jumbled, and not put in their chronological order.

Respectfully submitted,

WILLIAM LEMKE,
Counsel for Appellants.

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14

In
The Supreme Court
of the United States

OCTOBER TERM, 1940

No. 54

MARTIN J. BERNARDS and LENA BERNARDS,
his wife,

Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), and JOSEPH M.
LOOMIS, Trustee,

Respondents.

Upon Writ of Certiorari to the United States Circuit Court of
Appeals for the Ninth Circuit.

**BRIEF OF RESPONDENTS M. R. JOHNSON AND
JOSEPH M. LOOMIS, TRUSTEE.**

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INDEX

	Page
Statement of Facts	1
I. The Circuit Court of Appeals was without jurisdiction to recall its mandate or to revoke or modify its decree, for the reason that prior to the filing of the application therefor the term at which the decree was entered had expired and the mandate had issued	12
II. This is not a case where petitioners' motion in the Circuit Court of Appeals should be taken as an application for leave to file a bill of review or petition for rehearing in the District Court	22
(1) The subsequent decision of a higher court neither demonstrates an error of law apparent upon the face of a decree nor constitutes such new matter as will sustain a bill of review to vacate it	22
(2) This was not a case for rehearing in the District Court under the doctrine of John Simmons Co. vs. Grier Bros. Co., supra	25
III. The denial of petitioners' motion by the Circuit Court of Appeals was proper because there was no error in that court's judgment on the merits	27
(1) The matters involved in the orders of the District Court from which appeal was taken to the Circuit Court of Appeals had all been previously determined by the District Court, and the time for appeal from such determinations had long since expired	27

INDEX—Continued

Page

(2) The foreclosure sales of the real estate were valid and the bankrupts had lost title thereto before they invoked the benefits of the amended Frazier-Lemke Act	31
(3) The acts of the referee in appointing a trustee and liquidating the nonexempt personal estate were not erroneous	44
IV. The recent decisions of this court	46
(1) John Hancock Mutual Life Insurance Co. vs. Bartels, —U. S.—, 84 L. Ed. Advance Sheets 154	46
(2) Kalb vs. Feuerstein, —U. S.—, 84 L. Ed. Advance Sheets 281	48
(3) Union Joint Stock Land Bank vs. Byerly, —U. S.—, 84 L. Ed. Advance Sheets 689..	49
(4) Borchard vs. California Bank, —U. S.—, 84 L. Ed. Advance Sheets 867	51
Conclusion	52

TABLE OF CASES

	Pages
95 A. L. R. page 708.....	22
Bank of Eureka vs. Partington, 91 Fed. (2d) 587, 590 (9th Circuit)	44
Borchard vs. California Bank, —U. S.—, 84 L. Ed. Advance Sheets 867	51
Casey vs. Sterling Cider Co., 15 Fed. (2d) 52 (1st Circuit)	20
Clarke vs. Hot Springs Electric Light & Power Co., 76 Fed. (2d) 918 (10th Circuit)	26
Conboy, Trustee in Bankruptcy vs. First National Bank of Jersey City, 203 U. S. 141, 51 L. Ed. 128	26
Davis vs. Friedlander, 104 U. S. 570, 26 L. Ed. 818.....	35
Dixie Meadows Co. vs. Kight, 150 Ore. 395, 405.....	37
Eyster vs. Gaff, 91 U. S. 521, 23 L. Ed. 403.....	35
Fairmont Creamery Co. vs. Minnesota, 275 U. S. 70, 72 L. Ed. 168.....	14
First Trust & Savings Bank vs. Iowa-Wisconsin Bridge Co., 98 Fed. (2d) 416, 428.....	26
Foster Brothers Manufacturing Co. vs. National Labor Relations Board, 90 Fed. (2d) 948 (4th Circuit)....	16
In re Gerdes, 102 Fed. 318 (So. Dist. Ohio).....	35
In re Gillette Realty Co., 15 Fed. (2d) 193 (9th Circuit)	35
In re Glory Bottling Co. of New York, Inc., 283 Fed. 110	21
Grande vs. Arizona Wax Paper Co., 90 Fed. (2d) 801 (9th Circuit)	30

TABLE OF CASES—Continued

Pages

John Hancock Mutual Life Insurance Company vs. Bartels, —U. S.—, 84 L. Ed. Advance Sheets 154	2, 13, 23, 46, 48
Hart vs. Wiltsee, 25 Fed. (2d) 863 (1st Circuit)	17
Hawkins vs. Cleveland, C., C. & St. L. Ry. Co., 99 Fed. 322 (7th Circuit)	20
Heffron vs. Western Loan & Building Co., 84 Fed. (2d) 301, 305 (9th Circuit).....	44
Heidelberg vs. Slader, 1 Handy 456.....	50
Kalb vs. Feuerstein, —U. S.—, 84 L. Ed. Advance Sheets 281	36, 38, 48
Marcy vs. Miller, 95 Fed. (2d) 611, 612 (10th Circuit)	30
In re McIntosh, 95 Fed. (2d) 627 (9th Circuit).....	26
McWilliams vs. Blackard, 96 Fed. (2d) 43, 45 (8th Circuit)	30
Mintz vs. Lester, 95 Fed. (2d) 590, 591 (10th Circuit)	30
Miocene Ditch Co. vs. Champion, 197 Fed. 497 (9th Circuit)	19
National Brake & Electric Co. vs. Christensen, 254 U. S. 425, 65 L. Ed. 341.....	24
Oregon Code 1930 section 3-510.....	37
Oregon Code 1930 section 6-302.....	37
Oregon Code 1930 section 6-504.....	36
Oregon Code 1930 section 6-507.....	36

TABLE OF CASES—Continued

	Pages
Patents Process vs. Durst, 69 Fed. (2d) 283 (9th Circuit)	29
Pearce vs. Collier, 92 Fed. (2d) 237.....	41
Remington on Bankruptcy (4th Ed.) section 502.....	21
In the matter of Republic Pipe & Iron Corp., 73 Fed. (2d) 1010 (2nd Circuit).....	26
Reynolds vs. Manhattan Trust Co., 109 Fed. 97 (8th Circuit)	17
Roberts Auto & Radio Supply Co. vs. Dattle, 44 Fed. (2d) 159 (3rd Circuit).....	30
Roemer vs. Neumann, 132 U. S. 103, 33 L. Ed. 277.....	26
In re Rohrer, 177 Fed. 381 (6th Circuit).....	35
Roseburg Nat. Bank vs. Camp, 89 Ore. 67, 71.....	37
Sandusky vs. Nat. Bank, 23 Wall. 289, 23 L. Ed. 155..	21
Schell vs. Dodge, 107 U. S. 629, 27 L. Ed. 601.....	14, 19
Schram vs. Poole, 97 Fed. (2d) 566 (9th Circuit).....	26
Scotten vs. Littlefield, 235 U. S. 407, 59 L. Ed. 289.....	23
John Simmons Co. vs. Grier Bros. Co., 258 U. S. 82, 66 L. Ed. 475.....	23, 25
Staude Mfg. Co. vs. Labombarde, 247 Fed. 879 (1st Circuit)	19
Straton vs. New, 283 U. S. 332, 75 L. Ed. 1060.....	35
Sundh Electric Co. vs. Cutler-Hammer Mfg. Co., 244 Fed. 163 (2nd Circuit)	20
Tilghman vs. Werk, 39 Fed. 680, 682.....	23

TABLE OF CASES—Continued

Pages

Union Joint Stock Land Bank vs. Byerly, —U. S. —, 84 L. Ed. Advance Sheets 689.....	34, 38, 40, 42, 45 49
United States vs. American Railway Express Co., 265 U. S. 425, 435, 68 L. Ed. 1087, 1093.....	48
United States vs. Dowell, 82 Fed. (2d) 3 (8th Circuit)	26
Title 11 U. S. C. A., section 1.....	20, 21
Utah Power & Light Co. vs. United States, 242 Fed. 924 (8th Circuit)	19
Van Deveer vs. Phillips and Buttorf, 112 Fed. 966.....	21
Watts, Watts & Co. vs. Unione Austriaca, 239 Fed. 1023 (2nd Circuit)	20
Wayne United Gas Co. vs. Owens-Illinois Glass Co., 300 U. S. 131, 81 L. Ed. 557.....	26, 29, 30
Willis vs. Davis, 184 Fed. 889 (6th Circuit).....	26
Wright vs. Union Central Life Insurance Co., 304 U. S. 502, 82 L. Ed. 1490	36, 38
Wright vs. Vinton Branch, 300 U. S. 440, 462, 81 L. Ed. 736, 743	47

In
The Supreme Court
of the United States

OCTOBER TERM, 1940

No. 54

MARTIN J. BERNARDS and LENA BERNARDS,
his wife,

Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), and JOSEPH M.
LOOMIS, Trustee,

Respondents.

Upon Writ of Certiorari to the United States Circuit Court of
Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS M. R. JOHNSON AND
JOSEPH M. LOOMIS, TRUSTEE.

STATEMENT OF FACTS

The statement of facts contained in petitioners' brief herein omits certain facts which respondents deem material, and includes certain statements which are not supported by the record herein. For these reasons we deem it advisable to restate the facts.

On May 2, 1939, the Circuit Court of Appeals for the Ninth Circuit rendered a decree (R. 158) affirming two orders of the District Court of the United States for the District of Oregon, and thereafter stayed its mandate to permit petitioners to file a petition for certiorari in this Court, which they filed and which was denied October 23, 1939.

Thereafter and on October 28, 1939, the mandate of the Circuit Court of Appeals duly issued.

On December 4, 1939, this Court rendered its opinion in the case of *John Hancock Mutual Life Insurance Company vs. Bartels*, —U. S.—, 84 L. Ed. Advance Opinions 154, and on January 2, 1940, petitioners filed in the Circuit Court of Appeals a motion (R. 160) "for recall and correction, amendment, revision and/or opening and vacating mandate and judgment entered thereon," this being based upon the theory that the decision of the Circuit Court of Appeals was inconsistent with the later decision of this court in the Bartels case.

On March 22, 1940, the Circuit Court of Appeals denied this motion (R. 162), to review which this court has granted certiorari.

The prior history of the case is as follows:

On April 4, 1930, petitioner Martin J. Bernards purchased for \$45,500.00 a large farm in Washington County,

Oregon, and on the same day mortgaged it to respondent M. R. Johnson for \$70,000.00, part of which was used to pay the entire purchase price and the balance for other purposes, including the purchase of certain municipal bonds of the City of Orenco. Also included in the mortgage was a smaller tract previously purchased by petitioners and mortgaged the preceding October to the respondent Catherine Collins and, as additional security to the Johnson indebtedness, petitioners pledged to Mr. Johnson the above-mentioned bonds (R. 71, 72, 135, 136, 139 and 141).

Part of the property covered by the Johnson mortgage was subsequently subordinated to a new first mortgage in favor of the World War Veterans' State Aid Commission of Oregon (R. 71).

Part of the money loaned by Mr. Johnson to petitioners was in turn borrowed by him from The United States National Bank of Portland (Oregon), and the mortgage and pledge of bonds were assigned by him to it as security therefor (R. 72).

In April, 1934, respondent M. R. Johnson filed suit in the Circuit Court of Washington County, Oregon, to foreclose the mortgage (R. 72), at which time the security had been diminished by the sale to Washington County, on tax foreclosure, of upwards of 165 acres of the land (R. 139, 140). Unpaid taxes amounted to about \$15,-

000.00 (R. 143), unpaid interest on the Johnson mortgage to over \$11,000.00 (R. 113) and the principal was also overdue.

Decree of foreclosure was entered on July 11, 1934 (R. 72).

On August 10, 1934, one day before the day set for foreclosure sale, petitioners filed their petition, under section 75 of the bankruptcy act, for a composition or extension (R. 3).

The case was referred to a Conciliation Commissioner, who made his report setting forth that no composition or extension could be had (R. 6).

The court, at the request of the petitioners, again referred the case to the Conciliation Commissioner to enable them to submit a second proposal, and the Conciliation Commissioner again reported that no composition or extension could be had (R. 8, 9).

On December 19, 1934, petitioners filed their amended petition asking to be adjudged bankrupts and, on the same day, ex parte orders were entered adjudicating them bankrupts and referring the case to a referee (R. 9-14).

On May 28, 1935, this court in the Radford case held the former subsection (s) of section 75 unconstitutional.

A month later, petitioners applied to the court for an order referring the case for a third time to a conciliation

commissioner, and the court on the same day denied that application. The order, after the opening recitals, was as follows:

"And it appearing to the Court that said debtors have heretofore been adjudged bankrupts, and their bankruptcy proceeding is now pending before Willard L. Marks, Referee in Bankruptcy.

"And it further appearing that the secured creditor has already been delayed approximately one year by proceedings under these acts,

"It is Ordered that said petition be and the same hereby is denied." (R. 145)

Thereafter, respondents proceeded with the sheriff's sales which had been theretofore prevented by the proceedings in the Bankruptcy Court.

Foreclosure sale was held on the Johnson mortgage, covering all the property including the Orenco bonds, on June 29, 1935, and on the Collins mortgage, which was foreclosed July 9, 1935, on August 26, 1935 (R. 72, 73).

The Johnson sale was confirmed July 20, 1935 (R. 108) and the Collins sale September 16, 1935 (R. 73).

After the confirmation of both sales and on September 30, 1935, petitioner Martin J. Bernards, by his attorneys, filed a petition wherein he recited the passage of the amended act, which became effective August 28, 1935, and stated that the referee to whom his case had been referred

was of the opinion that the affairs of the bankrupt estate could be better administered by the Conciliation Commissioner for Washington County, Oregon (R. 16). The prayer of this petition was for:

"An order of this Honorable Court authorizing and directing said referee to transfer to this court all documents and records in his possession in the matter of the estates of said bankrupts, together with a report of all proceedings therein to the time of said transfer."

There was no request for any other relief.

Based on this petition, the court made orders recalling the reference to Referee Marks and referring the case to the newly appointed Conciliation Commissioner Kuratli (R. 17-19).

In the meantime, the bankrupts were still in possession of the real estate, but a writ of assistance had been placed in the hands of the sheriff of Washington County. On October 3, 1935, the bankrupts secured an order temporarily restraining the sheriff from executing this writ and calling upon him to show cause why he should not be permanently restrained therefrom. Upon a showing of cause by the sheriff and hearing thereon, the court, on December 18, 1935, made an order dissolving and refusing to continue this temporary restraining order.

This order (R. 48) recited the sheriff's sale and the

confirmation thereof prior to the issuance of the restraining order "and that said Circuit Court had jurisdiction over said suit and the parties thereto and the subject matter thereof, which jurisdiction it acquired prior to the commencement of any of the proceedings herein, and that by reason thereof the threatened acts of the sheriff of Washington County (Oregon) would not constitute an interference with any property of the bankrupt as defined by the Acts of Congress."

After the entry of this order, the Sheriff of Washington County proceeded to execute his writ of assistance, and the appellees Johnson and Collins have ever since been in possession of the real property, parcels 1 to 16. *

On July 1, 1936, sheriff's deed was issued to M. R. Johnson and The United States National Bank of Portland (Oregon) covering parcels 1 to 14 and parcel 16 (R. 138), and on September 10, 1936, sheriff's deed was issued to Catherine H. Collins covering parcel 15. (R. 73).

It will be noted that thus far in the story the bankrupts have made no application for relief under the amended act, except to ask that the reference to the referee be can-

*At page 5 of petitioners' typewritten brief, which is the only one served on us, there appears a statement, not founded on the record, concerning the alleged activities at this time of a concern called the Portland Loan Company. None of the respondents had any connection whatever with this company or these activities.

celled and the case referred to a Conciliation Commissioner. There has been no request on their part that their property be appraised, as provided by the amended act, that their unincumbered exemptions be set off to them, that proceedings against them be stayed, or that they be continued in possession of any property. It will also be noted that there has thus far been no attempt to review any order of the referee or Conciliation Commissioner or to appeal from any order of the court.

On July 15, 1936, nearly a year after the passage of the amended act and after the issuance of the sheriff's deed to respondent Johnson, the bankrupts filed with the Conciliation Commissioner a petition (R. 19) wherein they recited some of the previous history of the case, including the foreclosure sales, alleged that they were farmers and entitled to the possession of the real property, and prayed "for an order granting the undersigned immediate possession, control and management of the real properties described in said bankrupt's petition and referred to as parcels Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16; and for the further order restraining the Sheriff of Washington County and M. R. Johnson and the United States National Bank and Catherine Collins, and either or any of them, from transferring without purchase of said property in accordance with the terms and provisions of the Frazier-Lemke Act as amended; and for the further

order specifically extending the period of redemption as provided in said Frazier-Lemke Act." *

Even by this petition the petitioners did not ask for any appraisement or for the setting aside of exemptions or that they be allowed to retain possession of any property under the supervision and control of the court. What they did ask was that they be given possession, without any strings attached, of some real property of which they had long ago lost possession pursuant to sheriff's sales made after the termination of their composition proceedings and before the passage of the present act and pursuant to an order of the Bankruptcy Court permitting the sheriff to dispossess them, from which they had never appealed, and they also asked for the extension of a right of redemption which had already expired.

After a hearing before the Conciliation Commissioner on this petition and the cross-petitions of the creditors, the Commissioner on August 8, 1936, made an order (R. 49-53, 135-146) wherein he determined, among other things, that the bankrupts had never asked the court to appraise their property as provided by the amended act or to set aside their unincumbered exemptions and unincumbered interest or equity in their exemptions or that they be al-

*The filing date shown in the printed record is the date the Commissioner returned this record to the Clerk of the District Court. The Commissioner's filing date appears in the original typewritten record.

lowed to retain possession under the supervision and control of the court of any part of their property under the terms and conditions set forth in said act; that they had no interest in the real property and were not farmers within the meaning of the act. He further ordered that a trustee should be appointed to liquidate the assets of the bankrupts.

The applicable rule of the District Court (R. 146) allowed 20 days for filing a petition for review from the referee's order but no petition to review this order was filed by the bankrupts within that time or at all.

On August 29, 1936, the commissioner made an order appointing the appellee Joseph M. Loomis Trustee in Bankruptcy, and on September 3rd a further order approved the trustee's bond (R. 54).

The bankrupts thereupon filed a "notice of appeal" from these last two orders (R. 23). The commissioner, ignoring the informality of this method of review, transmitted his certificate to the court (R. 55) which duly reviewed and affirmed these two orders (R. 24).

On September 25, 1936, the property of the bankrupts was appraised, the foreclosed real property not being included in the appraisal (R. 58-63).

After this appraisal and on January 4, 1937, the bankrupts filed with the commissioner a petition asking that

their property be appraised "as requested in the amended petition," that exemptions be set off, that the Commissioner's order of August 8, 1936, be vacated, that the trustee be removed, that the trustee account for all property or its proceeds which came into his possession "and return it to the court for the use of the bankrupts," that the Orenco bonds, the pledge of which had been finally foreclosed before the act was passed, be returned, that an alleged cause of action on behalf of the bankrupts against M. R. Johnson be included in the schedules, and that M. R. Johnson and Mrs. Collins return all crops and proceeds of crops which they had had. (R. 25)

The trustee moved to dismiss this petition on the ground that all matters involved in it had already been adjudicated. Upon the hearing the Commissioner granted this motion to dismiss (R. 30), whereupon the bankrupts filed their petition for review.

On January 13, 1937, the bankrupts petitioned the court for an order restraining the trustee from making a sale of the nonexempt personal property, which the court denied (R. 31, 32). There was no appeal from this order.

On January 15, 1937, the bankrupts filed a petition wherein they requested in effect a general review of all previous orders in the case (R. 77). This petition and the appellees' answers thereto (R. 87, 91, 100) came on for hearing before the court, together with the review of the

commissioner's order dismissing the bankrupts' petition of January 4, 1937, and together also with a new motion for substantially the same relief, filed by the bankrupts on April 13, 1938 (R. 34).

On this hearing, the court made detailed findings (R. 64) and based thereon made two orders, one sustaining the order of the Conciliation Commissioner, as aforesaid (R. 35), and the other denying the petition and motion of the bankrupts (R. 37).

It was from these two orders that the petitioners appealed to the Circuit Court of Appeals, and they were, as aforesaid, affirmed by that court.

I.

THE CIRCUIT COURT OF APPEALS WAS WITHOUT JURISDICTION TO RECALL ITS MANDATE OR TO REVOKE OR MODIFY ITS DECREE, FOR THE REASON THAT PRIOR TO THE FILING OF THE APPLICATION THEREFOR THE TERM AT WHICH THE DECREE WAS ENTERED HAD EXPIRED AND THE MANDATE HAD ISSUED.

The decree of the Circuit Court of Appeals was rendered May 2, 1939, this being in the October, 1938 term. The mandate, having been stayed pending an application for certiorari to this court, issued in a later term. After

it had issued and been duly entered, petitioners applied to the Circuit Court of Appeals to recall it and reopen the case by reason of the subsequent decision of this Court in the case of *John Hancock Mutual Life Insurance Co. vs. Bartels*, —U. S.—, 84 L. Ed. Advance Opinions 154. Further on in this brief we intend to show that there is no inconsistency between the *Bartels* decision and that of the Circuit Court of Appeals herein but we will discuss the matter for the present as though the contrary were the case.

It has, of course, always been the law in the courts of the United States that an appellate court has control over its decision during the remainder of the term at which it was rendered, but in the interests of stability and in order, to use an oft-quoted phrase, that litigation might not outlive the litigants, this Court and the Circuit Courts of Appeal have permitted their judgments to be reopened after the term only in a few narrowly defined cases. These are as follows:

(1) The time for rehearing allowed by the rules of court may (but did not in the instant case) extend beyond the term.

(2) There are a few decisions to the effect that an appellate court may reconsider its decision after the term if its mandate has not yet issued.

(3) Even after the term and after mandate issued,

it may recall the mandate to correct a mere clerical error or to make the mandate conform to its judgment, or in case it did not have jurisdiction of the appeal.

Beyond this, under the applicable decisions, it may not go.

Petitioners in their brief have attempted to treat the question as one of laches. It is not that. It is one of jurisdiction.

The rule has been laid down by this court many times, two of the late cases being *Schell vs. Dodge*, 107 U. S. 629, 27 L. Ed. 601 and *Fairmont Creamery Co. vs. Minnesota*, 275 U. S. 70, 72 L. Ed. 168.

In the *Schell* case, a writ of error was dismissed and mandate issued, whereupon the defendants in error moved for the recall of the mandate for the purpose of awarding interest and damages for delay. This Court said *at page* 630:

"The defendants in error now apply to this court to correct the judgments and mandates in these cases so as to award to them interest as such, or as damages for delay. There is no doubt that, if the defendants in error in these cases had in season asked for judgments of affirmance, their applications would have been granted, and interest would have been allowed, in accordance with the decision just announced in *Schell v. Cochran* (ante, 543). But the difficulty now

is that we have no power to vary the judgments or the mandates, after the close of the Term, no especial right to do so in these cases having been reserved. It has always been held by this court that it has no power, after the Term has passed, and a cause has been dismissed or otherwise finally disposed of here, to alter its judgment in such a particular as that now asked for, the change of a dismissal of a writ of error, with its legal consequences, to an affirmance of the judgment below, with its legal consequences, and not an error of mere form, or a clerical error, or a misprision of the clerk, or the like. *Jackson v. Ashton*, 10 Pet., 480; *Bank v. Moss*, 6 How., 31, 38.

"The applications are denied."

In the *Fairmont* case, it was held that a motion to re-tax costs was too late after the end of the term and the issuance of the mandate.

In both of these cases this court based its lack of power upon the fact that the proposed alteration was one of *substance* and not "an error of mere form, or a clerical error, or a misprision of the clerk, or the like." That is certainly true in the instant case.

These decisions have been followed by countless decisions of the Circuit Courts of Appeals and have never been departed from by this Court.

Petitioners in their brief endeavor to avoid the effect of this rule by the contention that when the mandate of a Circuit Court of Appeals is issued at a later term than the

one in which its decision was rendered it may reconsider the decision not only during that term but during the whole of the term at which the mandate issued. *This is not the law.* The authorities cited by petitioners do not support it nor has it any foundation whatever.

On the other hand, the decisions in which the point was raised are definitely to the contrary. An example is *Foster Brothers Manufacturing Co. vs. National Labor Relations Board*, 90 Fed. (2d) 948 (4th Circuit). There the decree was rendered October 8th and the mandate issued in the following term. The court, upon being asked to recall this mandate in order to make it conform to a decision of the United States Supreme Court rendered in the interim between the original decision and the motion to recall, said:

"We are clearly without power to grant the relief asked. Not only had the time for filing a petition for rehearing expired long before the petition was filed, but the term at which the decree was entered had expired also, the mandate of the court had issued and our jurisdiction over the cause had ended. It is well settled that an appellate court is without jurisdiction to recall its mandate after the expiration of the term at which decree was entered. *Cycl. of Fed. Procedure*, Vol. 6, pp. 797; *Waskey v. Hammer*, C.C.A. 9th, 179 Fed. 273; *Reynolds v. Manhattan Trust Co.*, C.C.A. 8th, 109 Fed. 97. And it may not grant a rehearing after mandate has issued (*Sibbald v. U. S.*, 12 Pet. 448, 492, 9 L. Ed. 1167) or after the expiration of the term at which judgment was

rendered, unless jurisdiction be retained over the cause in some appropriate manner for that purpose (150 U. S. 82, 37 L. Ed. 1007) and it does not help the Board that . . . this court . . ." is in the position of "original jurisdiction. 74 Fed. (2) 834, 837.

"The petition to recall the mandate and grant a rehearing will accordingly be denied."

In *Reynolds vs. Manhattan Trust Co.*, 109 Fed. 97 (8th Circuit), cited in the Foster case, the term expired before the mandate issued, as in the instant case, whereupon an application was made to recall the mandate. The court indicated that it would have been disposed to grant the relief prayed for but held that its power to do so had expired and it no longer could.

That case although not, of course, binding on this court would seem to be on all fours with the instant one except that the mandate had not been delayed by reason of a pending application for certiorari.

However, even that circumstance was involved in *Hart vs. Wiltsee*, 25 Fed. (2d) 863 (1st Circuit). There the decree of the Circuit Court of Appeals was rendered on May 17th. A petition for rehearing filed June 24th was denied July 11th. A motion for stay of mandate by reason of a petition for certiorari was filed July 15th and granted August 2nd until further order of the court. The Supreme Court denied certiorari on December 1st, after the term, and on the same day the Circuit Court of Appeals ordered

that mandate issue. On January 3rd of the following year, the appellee moved to amend the final decree with regard to costs. The Circuit Court of Appeals denied this motion the same day. On January 4th the mandate issued. Appellee moved to recall the mandate, which motion the court denied, saying:

"The term of this court at which the final decree of May 17, 1927, was entered ended October, 1927, and after the close of that term this court had no power or jurisdiction to revoke or modify the award of costs made in that decree, unless the same were reserved by its order of October 3, 1927. (Citing authorities.) All of these cases hold that, after the close of the term at which a final decree has been entered, it cannot be modified in any matter of substance, but only for clerical errors.

"October 3, 1927, the following order was entered in this court:

"It is now here ordered that all causes not decided and all business of the term not disposed of be, and the same hereby are, continued until the next term, subject to and reserving the power and jurisdiction of the court over any cause until mandate issues under rule 32."

"By this order the court reserved to itself power and jurisdiction over pending cases until mandate should issue.

"As its mandate in this cause issued January 4, 1928, its power and jurisdiction over it so far as it had been reserved, ceased. After that it could recall its mandate for the purpose of correcting clerical

errors, or mere matters of form, but the award of costs is a matter of substance, and the court is without power and jurisdiction to revoke or modify its final decree in respect thereto."

This Court definitely recognized the rule in *Schell vs. Dodge, supra*. Four cases were tried together there and it appears from the report that the cases were dismissed November 21, 1881; that in three of them the mandates were not issued until after the close of the term, which would be in the October Term, 1882; that the motion to recall was submitted in that same term, on April 16, 1883. If petitioners' contention were correct the motion would have been in time, but the Court held otherwise.

Miocene Ditch Co. vs. Campion, 197 Fed. 497 (9th Circuit) and *Staupe Mfg. Co. vs. Labombarde*, 247 Fed. 879 (1st Circuit), cited in petitioners' brief, not only do not support petitioners' point but contain dicta to the contrary. In both of those cases the mandate issued at the same term as the opinion but the decision was based on the ground that the term *at which the judgment was rendered* had expired.

Absolutely the only case which we have been able to find where the mandate of an appellate court of the United States was recalled to correct a matter of substance after the term when the decision was rendered is *Utah Power & Light Co. vs. United States*, 242 Fed. 924 (8th

Circuit). This was in effect a consent decision, for both parties to the appeal joined in moving the court for a reconsideration of its decision to make it conform to the decision of this Court in another case between the same parties and involving the same question. It was granted without discussion.

See also, as illustrations of the general rule, *Watts*, *Watts & Co. vs. Unione Austriaca*, 239 Fed. 1023 (2d Circuit), *Sundb Electric Co. vs. Cutler-Hammer Mfg. Co.*, 244 Fed. 163 (2d Circuit), *Hawkins vs. Cleveland, C., C. & St. L. Ry. Co.*, 99 Fed. 322 (7th Circuit), and *Casey vs. Sterling Cider Co.*, 15 Fed. (2d) 52 (1st Circuit).

Petitioners, in order to make their application timely, cite the rule that there are no terms in a court of bankruptcy. That is true, but it does not help petitioners' case, for it is limited to "courts of bankruptcy" and a Circuit Court of Appeals, even when hearing an appeal from a bankruptcy court, is not a court of bankruptcy. The Bankruptcy Act itself (11 U.S.C.A. Sec. 1) defines "courts of bankruptcy," including in the definition only district courts and their referees, and distinguishes between them and "appellate courts," which include the Circuit Courts of Appeal. The latter have the same terms and are subject to the same limitations of jurisdiction in connection with them irrespective of the type of litigation before them, bankruptcy or otherwise.

We quote from *Title 11 U. S. C. A., section 1*, as follows:

"The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(3) 'appellate courts' shall include the circuit courts of appeals of the United States, the Court of Appeals of the District of Columbia, the supreme courts of the Territories, and the Supreme Court of the United States; (8) 'courts of bankruptcy' shall include the district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of Alaska, Hawaii, and Porto Rico."

Remington on Bankruptcy (4th Ed) sec. 502, says:

"The Circuit Court of Appeals may correct errors of the courts of bankruptcy, but it is not itself a court of bankruptcy, and the doctrine that 'there are no 'terms of court' in bankruptcy' does not seem to be applicable to its decrees; and such a decree rendered on an appeal, even if the matter were not appealable, cannot be vacated after term, and is not a nullity."

The cases cited by petitioners, *Sandusky vs. National Bank*, 23 Wall. 289, 23 L. Ed. 155, *In re Glory Bottling Company of New York, Inc.*, 283 Fed. 110, and *Van Deveer v. Phillips and Buttorf*, 112 Fed. 966, are not so the contrary. They deal solely with proceedings in the district court.

In the instant case, when petitioners made their application in the Circuit Court of Appeals to recall its man-

date and reopen the case, the term at which its decision was rendered had long since expired, as had the time for rehearing. The mandate had been issued and had been entered in the District Court. It is not contended that the mandate does not conform to the opinion of the Circuit Court of Appeals nor is there any contention that that court did not have jurisdiction of the appeal. It is sought to change the mandate in matter of substance. These things being so, we respectfully submit that the Circuit Court of Appeals had no jurisdiction to do otherwise than to deny the application.

II.

THIS IS NOT A CASE WHERE PETITIONERS' MOTION IN THE CIRCUIT COURT OF APPEALS SHOULD BE TAKEN AS AN APPLICATION FOR LEAVE TO FILE A BILL OF REVIEW OR PETITION FOR REHEARING IN THE DISTRICT COURT.

(1) The subsequent decision of a higher court neither demonstrates an error of law apparent upon the face of a decree nor constitutes such new matter as will sustain a bill of review to vacate it.

In the words of an editorial note in 95 *A. L. R.*, page 708, "it is well settled that a change in an authoritative rule of law, resulting from a decision by the United States

Supreme Court, announced subsequently to a former final decree, neither demonstrates an error of law apparent upon the face of that decree, nor constitutes new matter in pais, sufficient to justify the granting of a bill of review to reverse or modify the allegedly erroneous decision, on the ground that the new rule of law would have required a different result if it had been applied in the earlier case."

This rule has been laid down by this Court in *Scotten vs. Littlefield*, 235 U. S. 407, 59 L. Ed. 289 and *John Simmons Co. vs. Grier Bros. Co.*, 258 U. S. 82, 66 L. Ed. 475.

Any other rule, as said in *Tilghman vs. Werk*, 39 Fed. 680, 682, "would prolong litigation greatly and render judicial decisions untable in the highest degree."

Since there is no limit, aside from the doctrine of laches, to the time in which a bill of review may be filed, it is apparent that no judicial decision would ever be surely settled if it could at any time be upset by a decision in some other case between other parties.

The instant case comes squarely within this rule. The Circuit Court of Appeals had rendered its final decision, this Court had denied certiorari, mandate had issued, and the decision had become final, when this Court decided another case (the *Bartels* case) between other parties, which in petitioners' estimation would have called for a different decision had it been before the Circuit Court of

Appeals. To be sure, the *Bartels* decision followed quite closely after the issuance of the mandate herein but it might equally as well have come ten years afterwards. The line must be drawn somewhere and the authorities have quite properly drawn it at, not after, the time when the decision of the lower court becomes final.

The case of *National Brake & Electric Co. vs. Christensen*, 254 U. S. 425, 65 L. Ed. 341, is not an exception to the general rule for there the decision relied on was between the same parties, involving the same subject matter, and was claimed as *res judicata*, not merely *stare decisis*. This case consequently did not come within the rule, for *res judicata* is held to be "new matter."

Incidentally there was, in the petition in that case, a prayer for general relief which was relied on by the court as enabling it to treat what was in terms a petition to the Circuit Court of Appeals to reopen and rehear the case as a petition for leave to file a bill of review in the court below. There is no prayer for general relief in the petition here under review. Again, in that case, the Circuit Court of Appeals had declined to consider the petition on the ground that it had no jurisdiction to do so. This Court sent the case back to it without decision on the merits so that it might exercise its discretion to grant or deny the application. In the instant case, the Circuit Court of Appeals having rendered no opinion, it may well

be that it considered the application on its merits and concluded that there was no error in its previous decision.

(2) This was not a case for rehearing in the District Court under the doctrine of John Simmons Co. vs. Grier Bros. Co., supra.

That was a patent case in equity wherein, after a Circuit Court of Appeals had passed on an interlocutory decree of the court below but while the case was still pending in the latter court, application was made to the Circuit Court of Appeals for leave to apply for a rehearing in the court below by reason of a subsequent decision of this Court, in another case but involving the validity of the same patent. This Court held that it was not error for the Circuit Court of Appeals to grant the application, saying that the rule hereinbefore discussed regarding bills of review did not apply because the decree involved was interlocutory.

This case has no application to the instant one for two reasons: In the first place, the decision of the court that the Simmons decree was interlocutory because an accounting was ordered was based on the rule that there can be but one final decree in an equity suit. That is not true in bankruptcy. If nothing more remained to be done in the Bankruptcy Court in order to determine the rights of the parties in the instant case, then the decree of the Circuit Court of Appeals was final. So far as the real estate

and the respondents Johnson, Collins and the bank were concerned, it would appear self evident that nothing more did remain to be done.

Another well settled rule of law makes the Simmons decision inapplicable, namely, that *the denial of a petition for rehearing is not appealable.*

As stated by the Circuit Court of Appeals for the Eighth Circuit, in *First Trust & Savings Bank vs. Iowa-Wisconsin Bridge Co.*, 98 Fed. (2d) 416 at 428:

"The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a petition therefor, or the refusal of the petition, if entertained, is not the subject of appeal."

This rule has been declared by this court in *Wayne United Gas Co. vs Owens-Illinois Glass Co.*, 300 U. S. 131, 81 L. Ed. 557, *Conboy, Trustee in Bankruptcy vs. First National Bank of Jersey City*, 203 U. S. 141, 51 L. Ed. 128, and *Roemer vs. Neumann*, 132 U. S. 103, 33 L. Ed. 277. See also to the same effect: *In re McIntosh*, 95 Fed. (2d) 627 (9th Cir.), *Schram vs. Poole*, 97 Fed. (2d) 566 (9th Cir.), *Willis vs. Davis*, 184 Fed. 889 (6th Cir.), *In the matter of Republic Pipe & Iron Corp.*, 73 Fed. (2d) 1010 (2nd Cir.), *Clarke vs. Hot Springs Electric Light & Power Co.*, 76 Fed. (2d) 918 (10th Cir.), and *United States vs. Dowell*, 82 Fed. (2d) 3 (8th Cir.).

In the Simmons case, the orders complained of *granted*

a rehearing. In the instant case, it was denied. Even if petitioners' motion to reponere were to be considered an application for leave to file a petition for rehearing in the District Court, in spite of the fact that it was not that and contained no prayer for general relief and in spite of the finality of the decree sought to be reopened, the denial of such application would not, under the above authorities, constitute reversible error, for to make a distinction between the denial of a petition for rehearing and the denial of a petition for leave to file a petition for rehearing in a lower court would be to make of the latter application a meaningless formality.

III.

THE DENIAL OF PETITIONERS' MOTION BY THE
CIRCUIT COURT OF APPEALS WAS PROPER
BECAUSE THERE WAS NO ERROR IN THAT
COURT'S JUDGMENT ON THE MERITS.

(1) The matters involved in the orders of the District Court from which appeal was taken to the Circuit Court of Appeals had all been previously determined by the District Court, and the time for appeal from such determination had long since expired.

It will be recalled that after the sheriff's sales of the real property here involved had taken place and been

confirmed, during the interim between the Radford decision and the passage of the present Frazier-Lemke Act, a writ of assistance was placed in the hands of the Sheriff of Washington County, which the Bankruptcy Court temporarily enjoined him from executing, but that in December, 1935, after a hearing, the restraining order was dissolved on the ground that "the threatened acts of the Sheriff of Washington County (Oregon) would not constitute an interference with any property of the bankrupt as defined by the Acts of Congress."

By this order, of course, the District Court necessarily determined that the bankrupts were not entitled to the possession of the real property. We will hereinafter explain why we think the order was correct but the point we wish to make now is that no appeal from it was ever attempted.

Again, on August 8, 1936, after the sheriff's deed had issued, the Conciliation Commissioner heard a petition of the bankrupts and a cross-petition of the respondents herein other than Mr. Loomis, and made an order determining, among other things, that the bankrupts had not made application for the benefits of the Frazier-Lemke Act in accordance with its terms and were not entitled thereto, were not farmers, could not refinance themselves within the meaning of the Act and had no interest in the real property, that said real property was not within the

jurisdiction of the Bankruptcy Court and that a trustee in bankruptcy should be appointed to liquidate the estate. No review of or appeal from this order was ever attempted.

On December 15, 1936, the District Court affirmed on review orders of the Commissioner appointing the appellee Loomis Trustee in Bankruptcy and approving his bond. The order of affirmance was never appealed from and stands as *res judicata* that the trustee was properly appointed and duly qualified.

The District Court on January 13, 1937, denied an application of the bankrupts for an order restraining the trustee from selling the personal property, thereby determining again that it was proper for the trustee to liquidate this property. This was not appealed from.

The orders from which the bankrupts appealed simply denied again new applications for the same relief which had already been denied in these earlier orders. They constituted in effect simply an attempt to renew rights of appeal which had expired. That this will not be permitted is too clear for discussion. However, the following are a few of the decisions so holding:

Wayne United Gas Co. vs. Owens-Illinois Glass Co., 300 U. S. 131, 81 L. Ed. 557;

Patents Process vs. Durst, 69 Fed. (2d) 283 (9th Circuit) (order of referee in bankruptcy);

Grande vs. Arizona Wax Paper Co., 90 Fed. (2d) 801 (9th Circuit) (order of referee in bankruptcy);

Roberts Auto & Radio Supply Co. vs. Dattle, 44 Fed. (2d) 159 (3d Circuit);

McWilliams vs. Blackard, 96 Fed. (2d) 43, 45, (8th Circuit) (a Frazier-Lemke case);

Marcy vs. Miller, 95 Fed. (2d) 611, 612 (10th Circuit);

Mintz vs. Lester, 95 Fed. (2d) 590, 591 (10th Circuit).

The instant case does not come within the exception laid down in the *Wayne* case, *supra*, to the effect that if a petition for rehearing is "entertained" there may be an appeal from the order determining the matter on rehearing even though the time for appeal from the original order had expired, because here the new application for the same relief was not "entertained". On the contrary, the Conciliation Commissioner dismissed the bankrupts' petition of January 4, 1937, on the express ground that the matters involved therein had been previously adjudicated, and this dismissal was sustained by the District Court.

Neither does the case come within the exception made in the decisions to the effect that a referee's order does not become *res judicata* unless entered on an adversary hearing, for the referee's orders here involved *were* entered upon adversary hearing.

(2) The foreclosure sales of the real estate were valid and the bankrupts had lost title thereto before they invoked the benefits of the amended Frazier-Lemke Act.

It will be recalled that the foreclosure sales herein took place and the sale covering all of the property was confirmed prior to the enactment of the amended Frazier-Lemke Act in August, 1935, and after the decision of this court in the Radford case. Petitioners had filed their amended petition under the original subsection (s) and had been duly adjudicated bankrupts, and such adjudication had never been set aside. Petitioners now contend, as we understand them, that the adjudication was wholly void by reason of the invalidity of the former subsection (s). They deduce from this that the composition and extension proceedings, and therefore the automatic stay provided for by subsection (o), were still pending at the time of the sales and that the jurisdiction of the State Court was thereby ousted.

Our own position is, in the first place, that the invalidity of subsection (s) could not operate to invalidate the adjudication of bankruptcy.

Petitioners *had a right*, under the general bankruptcy law, to be adjudicated voluntary bankrupts. *They made application* therefor to a court having jurisdiction. *They were duly adjudicated.*

Their petition for adjudication (R. 10) recited:

"that they desire to obtain the benefits of the Acts of Congress relating to bankruptcy and particularly Section 75 thereof, as amended by an act entitled 'An Act to Amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto'; approved June 28, 1934."

Its prayer (R. 11) was as follows:

"Wherefore, your petitioners pray that they, and each of them be adjudged by this court to be bankrupts within the purview of said Acts of Congress."

The orders of adjudication followed exactly Official Form No. 12, prescribed for use in general bankruptcy proceedings, without any change or any reference to the Frazier-Lemke Act or subsection (s).

The enactment of the original subsection (s) offered to petitioners the prospect that *if they first took a certain step, namely, voluntary bankruptcy*, which even before the Act was passed they could have taken, they would then be permitted to take another step leading to a rental stay order. They took the first of these steps. They could not take the second because of the Radford decision but that did not alter the fact that *the first step had been taken*. It had been taken under a misapprehension, to be sure, and they might have retraced it by applying for dis-

missal, but nevertheless it had been taken, and they never tried to retrace it.

So, after the Radford decision, this case continued pending as an ordinary bankruptcy, and the reference to a referee in bankruptcy as distinguished from a conciliation commissioner continued unrevoked, although, in June, 1935, petitioners applied to the court for a third reference to a conciliation commissioner and the court denied it on the express ground that petitioners *were in bankruptcy*.

Subsection (o) provides that proceedings in other courts shall not be maintained:

"at any time after the filing of the petition under this section (i.e., the original debtor petition) and prior to the confirmation or *other disposition* of the *composition or extension proposal* by the court."

The meaning of this is clear, and it is equally clear that the adjudication of bankruptcy was a *disposition by the court* of any composition or extension proposal that had been made. No such proposal was any longer before the court. Not only is this obvious from the plain words of subsection (o) but from its purpose as well, for when it was enacted there was no subsection (s) at all. It was intended simply to preserve the status quo until the debtor could make his offer and have it considered by the creditors and the court. When he abandoned his attempts at

composition or extension and turned to some other form of proceeding, *the purpose of the stay was at an end.*

All this would, as a matter of fact, be true even if the adjudication had failed as such or been subsequently vacated; it would simply have been effective as a *disposition*.

This Court recognized the purpose and limitations of proceedings under subdivisions (a) to (r) when it adopted General Order No. 50, under which, had there been no adjudication in bankruptcy, it would have been the duty of the court to dismiss the proceedings not later than three months after the first meeting of creditors.

Under that General Order, had there been no adjudication, it would have been the duty of the court to dismiss the debtor proceedings even before the Radford decision had been handed down.

Petitioners cite *Union Joint Stock Land Bank vs. Byerly*, —U. S.—, 84 L. Ed. Adv. Sheets 689, in support of their position, saying in their brief that there was in that case an adjudication under former subsection (s) and that this court nevertheless treated the case as if the stay was still in effect until the case was dismissed. Petitioners are mistaken. There was a petition for adjudication but no adjudication under former subsection (s) in the *Byerly* case.

At the time of the foreclosure sales, then, subsection (o) did not stand in the way of them. The present sub-

section (s) had not been enacted. However, petitioners were in general bankruptcy and they will perhaps contend that this in itself was enough to invalidate the sales. The law is otherwise. It is to the effect that when a foreclosure proceeding is commenced in a state court prior to the commencement of bankruptcy proceedings, as was the case here, the state court retains jurisdiction after bankruptcy and the foreclosure may be completed. To this effect are:

Eyster vs. Gaff, 91 U. S. 521, 23 L. Ed. 403;

In re Gillette Realty Co., 15 Fed. (2d) 193 (9th Circuit);

In re Rohrer, 177 Fed. 381 (6th Circuit);

In re Gerdes, 102 Fed. 318 (So. Dist. Ohio).

To the same effect in principle are:

Straton vs. New, 283 U. S. 332, 75 L. Ed. 1060;

Davis vs. Friedlander, 104 U. S. 570, 26 L. Ed. 818;

which dealt with the enforcement of liens acquired by legal proceedings more than four months before bankruptcy.

The sales not having been inhibited by the proceedings in the Bankruptcy Court, it now becomes necessary to consider their effect, and this leads necessarily to a discussion of State law.

The essential feature for present purposes of the Ore-

gon practice regulating mortgage foreclosure is that the purchaser at the sale is entitled to the possession of the property *from the day of sale*. Sales of personal property are final at once, without right of redemption.

We believe no other case has come before this court under the Frazier-Lemke Act involving a similar statute. In the other cases, such as *Wright vs. Union Central Life Insurance Co.*, 304 U. S. 502, 82 L. Ed. 1490, involving the Indiana law, and *Kalb vs. Feuerstein*, —U. S.—, 84 L. Ed. Adv. Sheets 281, involving the Wisconsin law, the right of possession did not pass until the expiration of the period of redemption.

The pertinent Oregon statutes are as follows:

Oregon Code 1930 section 6-504:

"The decree may be enforced by the execution as an ordinary decree for the recovery of money, except as in this section otherwise or specially provided:

"1. When a decree of foreclosure and sale is given, an execution may issue thereon against the property adjudged to be sold. If the decree is in favor of the plaintiff only, the execution may issue as in ordinary cases, but if it be in favor of different persons, not united in interest, it shall issue upon the joint request of such persons or upon the order of the court or judge thereof on the motion of either of them; * * *

Oregon Code 1930 section 6-507:

"A decree of foreclosure shall order the mort-

gaged property sold, and property sold on execution issued upon a decree may be redeemed in like manner and with like effect as property sold on an execution issued on a judgment, and not otherwise. A sheriff's deed for property sold on execution issued upon a decree shall have the same force and effect as a sheriff's deed issued for property sold on an execution issued on a judgment."

Oregon Code 1930 section 6-302:

"The provisions of sections 3-101—3-108, inclusive, and sections 3-207—3-507, inclusive, and sections 3-509—3-606, inclusive, of this Code, shall apply to the enforcement of decree so far as the nature of the decree may require or admit of it; but the mode of trial of an issue of fact in a proceeding against a garnishee shall be according to the mode of trial of such issue in a suit."

Oregon Code 1930 section 3-510:

"The purchaser from the day of sale, until a resale, or a redemption, and a redemptioner from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and in such case, shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period."

Decisions showing that sales of personal property on execution are without redemption are:

Roseburg Nat. Bank vs. Camp, 89 Ore. 67, 71;
Dixie Meadows Co. vs. Kight, 150 Ore. 395, 405.

Under the Indiana law, which this court applied in the *Wright* case, there was a year's redemption period during which the mortgagor was entitled to remain in possession and continue in the enjoyment of the property as if no sale had taken place.

The Wisconsin law, applied in *Kalb vs. Feuerstein, supra*, provided for a year's stay of execution after decree, followed by a sale without redemption, thus arriving at the same result as the Indiana law.

The Ohio law, applied in *Union Joint Stock Land Bank vs. Byerly, supra*, authorizes redemption until confirmation of sale and permits the mortgagor to remain in possession until such confirmation.

Thus it was true that in all those cases, as Mr. Justice Reed said in the *Wright* case:

"The person whose land has been sold at foreclosure sale and now holds a right of redemption is, for all practical purposes, in the same debt situation as an ordinary mortgagor in default; both are faced with the same ultimate prospect, either of paying a certain sum of money, or of being completely divested of their land. * * * (p. 514)

"The rights of the purchaser are preserved, the possibility of enjoyment is merely delayed. The rights of a purchaser, who under the state law is entitled to the redemption money or possession within a year, are not substantially different from those of a mortgagee entitled, on the maturity of the obligation, to payment or sale of the property." (p. 516)

Under the Oregon practice, however, the purchaser at execution sale has not merely the *possibility* of enjoyment at the expiration of the period of redemption; he has a *present right* thereto. The mortgagor does not merely face the possibility of being divested of his property; he *has been divested*. The right of redemption does not delay the effectiveness of the sale as it does in the other States mentioned. It constitutes in effect *merely an option to repurchase*.

In the *Wright* case, the provision of amended subsection (n) extending the period of redemption was enough to enable the court to grant Wright a three-year stay, for at the time Wright applied for the benefits of the act he was rightfully in possession and entitled to continue so as long as the redemption period continued. On the other hand, petitioners herein were *not* rightfully in possession at the time amended subsection (n) went into effect. They were mere trespassers, *for the sheriff's sales had transferred all rights of possession and enjoyment to the respondents Johnson and Collins*. There was nothing to which subsection (n) could apply except an incorporeal right in the nature of an option and, except for this incorporeal right, the situation was exactly the same as that of the smaller tract of land in the *Wright* case, the sale of which had become final prior to the amendment of the statute. As to the Orenco bonds, which were sold sep-

arately at the same time as the real property, petitioners had no right whatever in them, for as personal property they were sold without redemption.

It may well be doubted whether subsection (n) was intended to apply at all to a right of redemption of the Oregon type, for it contemplates possession and there can be no possession of an option, but even if its provisions were applicable their mere enactment changed nothing, as this court expressly held in the *Byerly* case. It was necessary, if petitioners were to enjoy any rights under the amended Act, for them to make due application therefor.

Subsection (s) as amended provides (italics ours):

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer *may, at the same time, or at the time of the first hearing, petition the court that all of his property wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee,*

under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title."

We respectfully submit that under these words there are certain things a farmer must do if he wants the benefits of the Act. *First*, he must be adjudicated a bankrupt. That had been done. *Second*, he must *petition the court* that (a) *his property be appraised*, and (b) *his exemptions be set aside to him*, and (c) *he be allowed to retain possession, under the supervision and control of the court, of his property*. This application must be made not later than *the time of the first hearing*.

Petitioners in the instant case made no such application *at the time of the first hearing*. This has been held jurisdictional in *Pearce vs. Collier*, 92 Fed. (2d) 237. They did not ask to be *allowed to retain possession* of any property until their petition of July 15, 1936 (after the sheriff's deed to Johnson had issued) and even then they did not ask that such retention be "*under the supervision and control of the court*". They did not ask for *appraisal* or that *exemptions be set aside* until their petition of January 4, 1937, long after the trustee had been appointed and begun to function.

The statute provides that "*upon such a request being made*" the referee shall appoint appraisers, who shall appraise the property in the manner provided. *When the appraisement has been made*, it becomes the duty of the

referee to set aside exemptions and make an order for the possession of the property under the control of the court and "*when the conditions set forth in this section have been complied with*" the court is then to order a three-year rental stay. But in the instant case, until long after the redemption period had expired, the referee could not appoint appraisers because no request therefor had been made, either at the time of the first hearing or later, and therefore there could be no appraisal under the Act and, consequently, no order for possession and no rental stay order.

When the application was finally made in January, 1937, it came too late, not only because it had not been made at the time of the first hearing but because, by that time, the petitioners had no farm and, under the doctrine of *Union Joint Stock Land Bank vs. Byerly*, —U. S.—, 84 L. Ed. Advance Sheets 689, such an order would have been vain. Even had it been then made, it could not have affected the respondents Johnson and Collins, for their rights had long ago become final and complete.

Until after the redemption period had expired, petitioners did nothing at all to invoke the act except to file their petition of September 30, 1935, wherein they prayed in effect that the case be taken from Referee Marks, and to apply for and secure a temporary restraining order, which the court later dissolved, to restrain the Sheriff of

Washington County from acting under a writ of assistance against them.

In their first application for certiorari petitioners tried to bring themselves within the terms of the Act by the remarkable claim that their petition of February 8, 1935, for the benefits of former subsection (s), (R. 36) should be taken as an application for the benefits of amended subsection (s). They claimed, and claim again in their present brief, that this petition was "re-filed" on October 10, 1935, and was thereby given new life and spoke as of that date. The fact is, however, as clearly appears from the filing endorsements on the typewritten record herein, although not on the printed record, that this petition was originally filed with the referee, in spite of being addressed to the judges, and was returned to the clerk of the court by the referee with his final report, whereupon the clerk of the court put his filing stamp on it for the first time. This was merely part of the clerk's office routine—done without any request on the part of petitioners and probably even without their knowledge. It certainly could not transmute an application made in February, 1935, for the benefits of the old Act into an application made in October, 1935, for the very different benefits of a subsequent statute.

At this point we have seen that by the foreclosure sales in the summer of 1935 petitioners lost all their interest in the real property except the bare legal title and a right to

reclaim the beneficial ownership within a year. We have seen that that year passed without the necessary steps having been taken to invoke the Act, so that even the right of redemption had ceased to exist. We must now consider the proceedings that followed petitioners' application of July 15, 1936.

(3) The acts of the referee in appointing a trustee and liquidating the nonexempt personal estate were not erroneous.

We have pointed out that there was no attempt to review the referee's order directing the appointment of a trustee and the liquidation of the estate and that there was no appeal from the order of the court affirming, on review, the order appointing the trustee and the order approving his bond and that this and the subsequent orders in the administration of the estate have become res judicata.

Aside from that, however, the referee's order of August 8, 1936, was based on findings to the effect that petitioners were not farmers (R. 52) and had not complied with the requirements of the statute (R. 50). The evidence not having been made a part of the record, the court must presume that the findings were well founded.

Heffron vs. Western Loan & Building Co., 84 Fed. (2d) 301, 305 (9th Circuit);

Bank of Eureka vs. Partington, 91 Fed. (2d) 587, 590 (9th Circuit).

Furthermore it appeared specifically from the findings that petitioners had then no real property except an undivided one-eighth interest in a tract of property (not otherwise here involved) which was rented to a tenant who had been paying no rent (R. 52), and that they had made, until July 15, 1936, no application for the benefits of the Act and then had not applied for appraisal or the setting aside of exemptions or that the possession of real property which they did pray for be under the supervision and control of the court (R. 50).

Under the circumstances and under the doctrine of the *Byerly* case, *supra*, it would not have been proper for the referee to attempt to grant them any relief under subsection (s), for as this court said in the *Byerly* case (page 694), it would have been a vain thing to do so.

The only other course which the referee could take, in the absence of any petition for dismissal on the part of the bankrupts, was to continue the administration in bankruptcy in the usual course, which he did. We submit that there was no error in this, although we reiterate that had it been error the bankrupts could have taken advantage of it only by an appeal within the time allowed by law.


A trustee being necessary, respondent Loomis was elected and duly appointed and his appointment and qualification were approved by the judge on review. He

has done no acts except under and pursuant to orders of the court, duly made and not appealed from. We submit that even if those orders, or any of them, were for some reason erroneous the trustee was nevertheless entitled to rely on them and was protected by them.

IV.

THE RECENT DECISIONS OF THIS COURT

(1) *John Hancock Mutual Life Insurance Co. vs. Bartels*, —U. S.—, 84 L. Ed. Advance Sheets 154.

This is the case upon which petitioners based their application to the Circuit Court of Appeals to reopen their case. It was pending in this court at the time petitioners' first application for certiorari was denied by this court and was decided after the mandate of the Circuit Court of Appeals had issued and had been duly entered in the District Court. In that case, proceedings were begun after the enactment of the amended Frazier-Lemke Act in 1935. Thereafter there was an adjudication under subsection (s), and a timely request for appraisal, exemptions, etc. The adjudication was subsequently vacated by the District Court on the ground that there had been no good faith offer for the extension or composition and on the further ground that there was no possibility of the debtor rehabilitating himself within three years. 

The Circuit Court of Appeals for the Fifth Circuit reversed that decision on the ground that the debtor had a right to be adjudicated a bankrupt whether or not he was entitled to the benefits of subsection (s) and this court sustained the latter decision on the ground that a good faith proposal of composition or extension was not a requisite to relief under subsection (s) and on the further ground that the debtor's ability to rehabilitate himself could not be considered until after the entry of the stay order.

The dictum of Mr. Justice Brandeis in *Wright vs. Vinton Branch*, 300 U. S. 440, 462, 81 L. Ed. 736, 743, contained in footnote six, was expressly overruled.

Want of good faith and inability to rehabilitate were among the grounds for affirmance which we urged in the court below, and appear to have been considered by that court along with the other reasons presented on behalf of respondents. That, however, is no ground for reversal, for the court had other sufficient grounds, namely, that the bankrupts having theretofore lost all title to the real estate, "the court could not properly have granted appellants' petition of January 15, 1937, or their motion of April 13, 1938." (R. 156), that when the sales took place there was no stay in effect, and that according to the findings of the District Court the bankrupts "have made no attempt to comply with the conditions required of them

by the 'Frazier-Lemke' amendment to the Acts of Congress in relation to bankruptcy, necessary to be complied with by them in order to obtain the right and privilege of a three years' stay of enforcement of the obligations owned and held by their creditors and possession of the real and personal property described in the schedules." However, even if in the opinion of the court below no reasons for its decision had been given except want of good faith and inability to rehabilitate, which the *Bartels* decision holds immaterial, that would still be no ground for reversal if any other reason were suggested or occurred to this Court which would justify the decision. *United States vs. American Railway Express Co.*, 265 U. S. 425, 435, 68 L. Ed. 1087, 1093. We have hereinbefore suggested a number of reasons why, in our view, the decision of the court below was correct.

(2) *Kalb vs. Feuerstein*, ——U. S.——, 84 L. Ed. Advance Sheets 281.

In the *Kalb* case, a petition under section 75 was filed in 1934 and dismissed June 27, 1935, without any adjudication in bankruptcy having taken place. Foreclosure sale was had July 20, 1935. The Frazier-Lemke proceedings were reinstated September 6th and the sale was confirmed September 16th. No adjudication under subsection (s) having taken place, the case involved only the automatic

stay under subsection (o) and the effect of the confirmation order in the State Court, had after the reinstatement had revived the automatic stay. This Court held that the act of the State Court in confirming the sale and the subsequent acts of the State Court and its officers were absolutely void. It held, in other words, that during composition and extension proceedings a State Court has no jurisdiction whatever. That was the full extent of the decision.

It is obvious that this can have no application to the instant case, for here no composition or extension proceedings were pending at any time when any proceedings were taken in the State Court or by State officers. Neither, if that makes any difference, were any proceedings under amended subsection (s) pending during any such time, for the foreclosure decree was rendered before any proceedings in the Bankruptcy Court, sale and confirmation took place after the composition and extension proceedings had terminated and before amended subsection (s) was passed, and sheriff's deed issued before any application for its benefits by the petitioners.

(3) *Union Joint Stock Land Bank vs. Byerly*,
—U. S.—, 84 L. Ed. Advance Sheets 689.

In this case, debtor proceedings were filed in 1934. There had already been a decree of foreclosure and the

Bankruptcy Court made an order permitting the foreclosure sale to be held but not permitting it to be confirmed. The case was in Ohio and, under Ohio law, the mortgagor is entitled to redeem, and to retain possession, until confirmation. *Heidelbach vs. Slader*, 1 Handy 456.

In February, 1935, an amended petition was filed but no adjudication of bankruptcy took place. In August, 1935, the case was dismissed on application of the debtor. Thereafter, the sale was confirmed and, after that, a motion for reinstatement of the debtor proceedings was filed and granted. Subsequently, the court made an order of disclaimer as to the real property and denied a requested reference to a conciliation commissioner. This court held that the order permitting sale during the debtor proceedings was erroneous but not void, saying (*at page 693*):

"The District Court did not lose jurisdiction by erroneously construing or applying provisions of the statute under which it administered the bankrupt estate. Its order was voidable but not void and was not to be disregarded or attacked collaterally in the State Court."

Since the order was valid, it was held that the sale was valid and, therefore, its confirmation was effective, and when the proceedings were reinstated the debtors had no interest in the real estate.

In the instant case, of course, both sale and confirmation took place in the summer of 1935 after the Radford decision and before the amendment of the statute. The only other difference is that, in the *Byerly* case, debtor proceedings were terminated by dismissal while, in the instant case, they were terminated by a voluntary bankruptcy. In both cases the effect was to terminate the property rights of the mortgagors at a time when no bankruptcy stay prevented it.

However, the importance of the *Byerly* case in the present controversy is that it squarely recognizes and applies, in a *Frazier-Lemke* case, the usual rule that if a court has jurisdiction of the parties and the subject matter its orders are not void even though they may be erroneous, and can only be attacked by appeal to a higher court, *thus definitely sustaining the argument made in subdivision III, (1) of this brief.*

(4) *Borchard vs. California Bank*, —U. S.—, 84 L. Ed. Advance Sheets 867.

This was a case where after various proceedings, a debtor was duly adjudicated a bankrupt and applied for the benefits of amended subsection (s). Before his petition for appraisal, etc. had been acted on, he entered into stipulations with the mortgagee providing a plan for the operation of the property and reserving, without

prejudice, the rights of the parties. Subsequently, the debtor renewed his application for the benefits of subsection (s) and the mortgagee petitioned for leave to foreclose. The court granted the latter application and this Court reversed it, saying that after the debtor's application for the benefits of subsection (s) the procedure outlined by that subsection should have been followed and that the parties were not at liberty to adopt a different procedure. It is obvious from this statement that the case can have no application to the one now before the court.

CONCLUSION

In conclusion, we respectfully submit that the order of the Circuit Court of Appeals for the Ninth Circuit, made March 22, 1940, was right and should be affirmed by this court because:—

(1) The term having expired and its mandate issued, the Circuit Court of Appeals had no jurisdiction to recall the mandate or reopen its decree.

(2) The subsequent decision of a higher court in a different case, between other parties, is not ground for a bill of review.

(3) The judgment sought to be reopened being final, the Circuit Court of Appeals could not have authorized a rehearing in the District Court and, even if it could, its refusal so to do would not have been appealable.

(4) The judgment of the Circuit Court of Appeals, sought to be reopened, was right because:—

(a) The orders of the District Court, affirmed by the Circuit Court of Appeals, amounted merely to refusal to rehear previous decisions as to which the time for appeal had expired and which had become res judicata;

(b) The sheriff's sales having taken place after the termination of debtor proceedings and while petitioners were in ordinary bankruptcy and before the amendment of the Frazier-Lemke Act, and the redemption period having expired before the amended act was invoked, petitioners had lost all title to the real estate before they took any proper steps to secure the benefits of the amended act.

(c) It was therefore proper for the conciliation commissioner to deny a stay order and proceed with bankruptcy administration.

Respectfully submitted,

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In
The Supreme Court
of the United States

OCTOBER TERM, 1940

No. 54

MARTIN J. BERNARDS and LENA BERNARDS,
his wife,

Petitioners.

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), and JOSEPH M.
LOOMIS, Trustee,

Respondents.

Upon Writ of Certiorari to the United States Circuit Court of
Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT CATHERINE COLLINS

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INDEX

Pages

Statement of Facts	1
Summary of Argument	6
Argument	7
Introduction	7
Point I	9
I. The stay of foreclosure provided in Section 75 (o) of the Bankruptcy Act applies only to a period "prior to the confirmation or other disposal of the composition or extension proposal" which period expires when the debtor is adjudged a bankrupt....	9
Point II	15
II. The stay under Section 75 (s) is not an automatic stay, but is a judicial stay to be granted upon compliance with specified conditions. Bankrupts never obtained, and—upon the facts found—were never entitled to any such stay.....	15

TABLE OF CASES

Hardt v. Kirkpatrick, 9 Cir. 91 F. 2d 875.....	13
Kalb v. Feuerstein, 308 U. S. 433.....	12
Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555	13
Oregon Code 1930 Section 3-505.....	18
Oregon Code 1930 Section 3-510.....	16
Union Stock Land Bank v. Byerly, 310 U. S. 1.....	12, 14

In
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No. 54

MARTIN J. BERNARDS and LENA BERNARDS,
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UNITED STATES NATIONAL BANK OF
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LOOMIS, Trustee, *Respondents.*

Upon Writ of Certiorari to the United States Circuit Court of
Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT CATHERINE COLLINS

STATEMENT OF FACTS

The following chronological outline of proceedings
will serve as a basis of fact for determining the rights of
the parties:

<u>Record</u> <u>page</u>	<u>Date of</u> <u>filing, etc.</u>	<u>Proceedings</u>
	<u>1933</u>	
73	April 12	Catherine Collins commenced foreclosure of her mortgage in State Court.

<u>Record page</u>	<u>Date of filing, etc.</u>	<u>Proceedings</u>
	<u>1934</u>	
72	April 6	Johnson and Bank commenced foreclosure of their mortgage in State Court.
72	July 11	State Court entered decree in Johnson and Bank foreclosure.
1	August 10	The Bernards filed petition for composition-extension.
3	August 10	District Court order restraining Sheriff, Johnson and Bank from proceeding with sale of debtors' real and personal property under a foreclosure decree in Oregon Circuit Court or from interfering with debtors' possession. (This order was set aside as of Feb. 18, 1935 (R 74) because the stay under Section 75 (a) to (r) is self-executing and the order was superfluous.)
6	August 10	Reference of case to Conciliation Commissioner.
6	October 17	Conciliation Commissioner discharged on his report that debtors and creditors could not agree.
7	October 27	Debtors petition that they wished to submit a second proposal to creditors and asking for reference to Conciliation Commissioner.

<u>Record page</u>	<u>Date of filing, etc.</u>	<u>Proceedings</u>
8	October 29	Case re-referred to Conciliation Commissioner.
8	December 15	Conciliation Commissioner reported that a second meeting with creditors was held December 4, 1934. A proposal was made by debtors which was rejected by Johnson, majority creditor.
9	December 19	The Bernards filed amended petition under Section 75 (s).
13, 14	December 19	Adjudication of bankruptcy.
14	December 20	Order of reference to referee in bankruptcy.
<u>1935</u>		
36	February 8	The bankrupts petitioned for appraisal and for possession under 75 (s).
15	May 21	Selection of appraisers.
	May 27	Section 75 (s) held unconstitutional in Radford case.
145	June 28	The bankrupts attempted a third proposal for composition which was denied by the court because of previous adjudication in bankruptcy.
72	June 29	Sale in Johnson and Bank foreclosure.

<u>Record page</u>	<u>Date of filing, etc.</u>	<u>Proceedings</u>
73	July 9	State Court entered decree in Collins foreclosure.
73	August 26	Sale in Collins foreclosure.
	August 28	Amended Sec. 75 (s) became effective.
16	September 30	The bankrupts petition District Court that Referee transfer all documents and records to the Court together with report.
17	September 30	Order directing Referee to return record, etc.
19	October 15	Order of reference to Conciliation Commissioner.
48	December 18	District Court order dissolving restraining order made Oct. 3, 1935 against Sheriff from executing writ of assistance requiring Sheriff to oust bankrupts from possession of real property described in bankrupts petitions. <i>(No appeal taken).</i>

1936

	June 29	Redemption period on Johnson and Bank foreclosure expired (Oregon Code 1930, Sec. 3-505).
138	July 1	Sheriff's deed issued to Johnson and Bank on their foreclosure.

<u>Record page</u>	<u>Date of filing, etc.</u>	<u>Proceedings</u>
19	July 15	The bankrupts petitioned Conciliation Commissioner for order granting immediate possession of Parcel 15, restraining Mrs. Collins from transferring said property and for extension of redemption period.
22	August 8	Bankrupts reply to answer and petition of Johnson and Bank.
49, 135	August 8	Conciliation Commissioner made order and decree denying petition of July 15, 1936. (<i>No appeal taken</i>).
	August 26	Redemption period on Collins foreclosure sale expired. (OC 1930 Sec. 3-505).
54	August 29	Order of Conciliation Commissioner appointing trustee.
54	September 3	Order approving trustee's bond.
73	September 10	Sheriff's deed issued to Mrs. Collins on her foreclosure.

The foregoing outline contains all items shown in the Record in the proceedings in the foreclosures and in bankruptcy down to the date of the sheriff's deed to Mrs. Collins.

The foreclosure proceedings of the mortgage belong-

ing to the respondents, Johnson and The United States National Bank of Portland, Oregon, closely coincide with Mrs. Collins' foreclosure as to dates, and their respective legal rights are substantially the same. Mrs. Collins, however, has no claim to the bankrupts' property other than under her mortgage on Parcel 15; that is, she has no deficiency judgment or general unsecured claim. She is, therefore, not interested in the personal property or the acts of the appraisers and trustee concerning it.

Respondents Johnson and the Bank, on the other hand, have a deficiency judgment and a general claim, and are, consequently, interested in obtaining dividends out of the proceeds of sale of the personal property.

SUMMARY OF ARGUMENT

This respondent adopts the argument in the brief of respondents Johnson and Trustee, except pages 44 and 45 relating the appointment and acts of the trustee, and further submits the following:

Each step taken in the foreclosure of Mrs. Collins' mortgage was at a time when the Circuit Court of the State of Oregon for Washington County had exclusive jurisdiction, because, as the Circuit Court of Appeals properly held,

- I. The stay of foreclosure provided in Section 75 (o) of the Bankruptcy Act applies only to a period

"prior to the confirmation or other disposal of the composition or extension proposal" which period expires when the debtor is adjudged a bankrupt.

- II. The stay under Section 75 (s) is not an automatic stay, but is a judicial stay to be granted upon compliance with specified conditions. Bankrupts never obtained, and—upon the facts found—were never entitled to any such stay.

ARGUMENT

INTRODUCTION

No question has been raised as to the regularity of Mrs. Collins' foreclosure, provided the State Court had jurisdiction.

Mrs. Collins claims that the State Court regained jurisdiction of her pending mortgage foreclosure on December 19, 1934, when the order of adjudication in bankruptcy was entered, because on that date and by that order any stay provided in the composition-extension proceeding was terminated and the State Court was at liberty to proceed with the foreclosure.

It is further contended by Mrs. Collins, that the only later stay possible for the bankrupts to obtain was under Section 75 (s) paragraph 2, and that the bankrupts never complied with conditions necessary to obtain such a stay.

On the other hand, the bankrupts claim that the stay under Section 75 (o) was not terminated by the adjudication in bankruptcy on December 19, 1934, or otherwise, and is still in existence, prohibiting any step being taken in the foreclosure since August 10, 1934, when the bankrupts filed their petition for composition-extension. On page 28 of their brief the bankrupts express the difference between the two positions as follows:

"In the light of the Kalb decision interpreting Section 75, there can be no doubt but that the provisions of sub-sections (n) and (o) remain in effect after the farmer-debtor amends his petition asking to be adjudged a bankrupt and after an adjudication pursuant to such request.

"The decision of the Circuit Court of Appeals, here in question, holds that the adjudication on December 19, 1934, under the invalid subsection (s) was a disposition of the proceedings for composition or extension and a termination of the stay provided by sub-section (o)."

POINT I.

THE STAY OF FORECLOSURE PROVIDED IN SECTION 75 (o) OF THE BANKRUPTCY ACT APPLIES ONLY TO A PERIOD "PRIOR TO THE CONFIRMATION OR OTHER DISPOSAL OF THE COMPOSITION OR EXTENSION PROPOSAL" AND EXPIRES WHEN THE DEBTOR IS ADJUDGED A BANKRUPT.

Section 75 of the Bankruptcy Act, under which this case has proceeded, is composed of two parts, first, sub-sections (a) to (r) containing the provisions for composition or extension, and second, sub-section (s), providing for a farmer's adjudication as a bankrupt, coupled with a stay of three years for any conflicting proceedings, during which time he shall have possession of the farm on a rental basis, all under the supervision of the Court.

In order to determine how long the stay granted in (n), (o) and (p) continues in effect, it is necessary to examine the history of the act. Original Section 75 consisted of sub-sections (a) to (r), and was enacted March 3, 1933 (c. 204 Section 1, 47 Stat. 1470). While these sub-sections have been amended, they remain substantially the same as when first enacted.

They provide that on petition a farmer debtor may propose a composition or extension of time to pay his debts, and if acceptable to his creditors, the proposal is confirmed by the court. Sub-section (l) provides, "Upon

the confirmation of a composition the consideration shall be distributed under the supervision of the conciliation commissioner as the court shall direct, and the case dismissed. Upon the confirmation of an extension proposal the court may dismiss the proceeding or retain jurisdiction of the farmer and his property during the period of the extension in order to protect and preserve the estate and enforce through the conciliation commissioner the terms of the extension proposal."

During the composition-extension proceeding thus provided for the Bankruptcy Court has exclusive jurisdiction between the date of the filing of the petition and the date of the disposition by the Court of the composition-extension proposal.

In considering the meaning of the language of Section 75, it is well to keep in mind the separate nature of the (a) to (r) and the (s) provisions of the section.

The composition-extension provisions treated the farmer debtor as a person free to negotiate with his creditors and to make a contract with them as to terms of payment, both by reduction in amounts payable to his creditors, and extension of time in which to pay. He was provided with the help of the Conciliation Commissioner and no other court was allowed to proceed against him or his property during the pendency of the composition-extension proceeding.

This earlier part of Section 75 furnishes the farmer a remedy complete in itself and until June 28, 1934, when sub-section (s) was added, could not have had any relation to sub-section (s).

Commencement of proceedings under (a) to (r) both as to time and method, is provided for in (c) and the subsequent procedure in composition-extension is provided for. The manner and time of terminating those proceedings needs some examination. As noted above, sub-section (l) provides for a final termination where distribution is made under a composition which has been confirmed, and also provides for a conditional termination where an extension proposal has been confirmed. However, in a case like the present one where the proposal has not been accepted by the creditors, the termination is not so clear. In such event there are, however, three ways in which the proceeding may be disposed of.

1. Rule 50 of the "General Orders in Bankruptcy", subdivision (4) provides, "If the farmer has not applied for confirmation within such reasonable time as has been finally fixed therefor, which shall be not later than three months after the date of the first meeting, the conciliation commissioner shall, unless the judge for cause shown shall have permitted a further extension, forthwith report the facts to the judge, who shall thereupon dismiss the proceedings."

2. The first sentence in (s), both old and new, provides, "Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt."

3. A filing of a voluntary petition in bankruptcy and obtaining an adjudication.

In the present case the farmer failed to obtain the acceptance of his proposal for a composition or an extension and chose to be adjudicated a bankrupt under the first sentence of (s) on December 19, 1934. The adjudication of the farmer as a bankrupt operated as a disposition of the composition or extension proposal. This is the only result consistent with a logical interpretation of the act. The act itself provides for no other way for a court's disposition of the composition or extension agreement. The interpretation contended for by petitioners, that the stay provided for by (o) continues until all proceedings, including those under (s) are disposed of, is denied not only by the wording of (o), but by the fact that (s) contains its own stay provisions in paragraph 2.

Neither *Kalb v. Feuerstein*, 308 U. S. 433 nor *Union Joint Stock Land Bank v. Byerly*, 310 U. S. 1, discuss this question. They cannot be said to be controlling here.

If the adjudication is a *disposition* of the composition-

extension proposal, then the stays provided for under 75 (o) are concluded by such adjudication and the creditor is free to pursue his remedy outside of the bankruptcy court until a stay is obtained under (s) paragraph 2, as will be hereinafter shown. See *Hardt v. Kirkpatrick* (C. C. A. 9), 91 F. (2d) 875.

No stay was ever obtained under the terms of (s) (2) in the present case. All the steps taken to complete Mrs. Collins' foreclosure were taken during this period after the stay provided by 75 (o) had terminated. Consequently Mrs. Collins obtained her rights by virtue of a foreclosure during which the Oregon courts were not subject to the stays provided by either (o) or (s) (2) of Section 75.

But the Petitioner argues. The effect of the adjudication of December 19, 1934 was nullified by *Louisville Joint Stock Land Bank vs. Radford*, 295 U. S. 555.

When the Radford case declared certain provisions in old (s) were unconstitutional, it did not disturb other parts of old (s).

This is shown by the identity of the first part of the Frazier-Lemke acts in both of which the introductory paragraph and that part of the first sentence in paragraph (1) ending with the words "The debtors' property shall remain in the debtor", are substantially identical. Also, paragraph (5) of the new act provides: "This act shall be held to ap-

ply to all existing cases now pending in any Federal Court, under this act, as well as to future cases; and all cases that have been dismissed by any Conciliation Commissioner, Referee, or court, because of the Supreme Court decision holding the former sub-section (s) unconstitutional shall be promptly reinstated without any additional filing fees or charges."

In *Union Joint Stock Land Bank v. Byerly*, 310 U. S. 1, 60 Supreme Court 773, one item in the statement of facts reads "May 27, 1935, this court held certain features of Section 75 (s) unconstitutional." This court apparently has not considered that the Radford case nullified all of old (s).

Moreover, all parties concerned, including the District Judge, Conciliation Commissioner, the respondents and particularly the bankrupts, have from the time of the petition and adjudication, December 19, 1934 on through the bankruptcy proceedings acted only under either old (s) or new (s). The result of the foregoing is that the amended petition and adjudication on December 19, 1934 have been treated by all parties as valid. The bankrupts themselves considered it unnecessary to file another amended petition after the enactment of new (s).

But even in the absence of (s) and even assuming that it was invalid the stay provided for under (o) would still have been terminated. In the absence of (s) the

debtor could have applied for a voluntary adjudication in bankruptcy. Such an adjudication would amount to another *disposition* of the composition-extension proposal. After the adjudication the proposal was at an end and ordinary bankruptcy rules would then regulate the treatment of suits in non-bankruptcy courts.

No matter from what angle it is considered the composition-extension proposal was terminated. The debtor had caused the court to make a disposition.

Were there any other stays in effect to challenge the state court's jurisdiction during the foreclosure period? The Petitioners failed to obtain any stay and such stays as were available were not automatic.

POINT II

THE STAY UNDER SECTION 75 (s) IS NOT AN AUTOMATIC STAY, BUT IS A JUDICIAL STAY TO BE GRANTED UPON COMPLIANCE WITH SPECIFIED CONDITIONS. BANKRUPTS NEVER OBTAINED, AND UPON THE FACTS FOUND, WERE NEVER ENTITLED TO ANY SUCH STAY.

Because the adjudication terminated all the composition-extension proceedings, including the stay under (o), it was necessary, in order that the bankrupts might obtain a stay of Mrs. Collins' foreclosure suit and the right of

possession of the mortgaged land, that they proceed as provided in (s) by obtaining an appraisal of the property and exemptions and an order that they remain in possession.

On February 8, 1935 they petitioned for appraisal and possession under old (s). (R. 36) Appraisers were selected on May 21, 1935, (R. 15) but on May 27, 1935 old (s) was declared unconstitutional.

As previously stated, after December 19, 1934, when the adjudication in bankruptcy was entered and the stay under (o) terminated, the Circuit Court of the State of Oregon regained jurisdiction. No action was taken, however, in the State court until after the Radford case, when the State court having jurisdiction proceeded with the foreclosure, and on July 9, 1935 entered its decree of foreclosure. (R. 73) This was followed on August 26, 1935 by the foreclosure sale of the mortgaged property. (R. 73) Under the Oregon statute this sale entitled Mrs. Collins, as purchaser at the sale, to possession of the premises, which was taken by her.

Oregon Code 1930 Section 3-510:

- "The purchaser from the day of sale, until a resale, or a redemption, and a redemptioner from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and in such

case, shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period."

On December 18, 1935, the District Court entered an order dissolving a restraining order made October 3, 1935 against the sheriff of Washington County, (R. 48) restraining the execution of a writ of assistance requiring him to oust the bankrupts from possession of the real property described in bankrupts' petitions. No appeal was taken from this order. The restraining order and the writ of assistance both related to the foreclosure proceeding of respondent Johnson against the bankrupts and did not include Mrs. Collins. This matter is in point for this respondent only because it is the law of the case of which Mrs. Collins can take advantage.

Nothing more happened in the bankruptcy proceedings, as far as it concerned Mrs. Collins or the property she bought at foreclosure, until July 15, 1936 when the bankrupts petitioned the Conciliation Commissioner for an order granting them immediate possession of Parcel 15, restraining Mrs. Collins from transferring said property and for extension of the redemption period (R. 19) On August 8, 1936 the Conciliation Commissioner made an order and decree denying the petition of July 15, 1936, (R. 49, 135) and from this order and decree no appeal was taken. On August 26, 1936 the redemption period in

the foreclosure sale expired, and on September 10, 1936 the Sheriff's deed was issued to Mrs. Collins on the foreclosure. (R. 73).

Oregon Code 1930 3-505:

"The mortgagor or judgment debtor whose right and title were sold, or his heir, devisee or grantee, who has acquired by inheritance, devise, deed, sale or by virtue of any execution, or by any other means, the legal title to the property sold, may, at any time within one year after the date of sale redeem the property on paying the amount of the purchase money, with interest thereon at the rate of 10 per centum per annum from the date of sale." Etc.

The foregoing facts show that from the time when the State court gained jurisdiction on December 19, 1934, the only one of the conditions described in (s) in order to obtain the stay provided for in paragraph (2) was the bankrupts' petition of February 8, 1935 for appraisal and possession. The appraisal didn't occur until October 28, 1936, (R. 58) more than six weeks after Mrs. Collins had received her deed.

The bankrupts cannot claim that they were without remedy to stay the foreclosure proceedings in the period between the adjudication and any stay to which they would be entitled under sub-section (s) paragraph 2. To prevent completion of foreclosure in that period, the bankrupts were entitled, on proper showing, to obtain a stay until it

became practicable for them to obtain a stay under subsection (s) paragraph 2. For example, in the Collins case, if the bankrupts before August 26, 1935, which was the date of sale, could have made a sufficient showing, the court would have granted a stay. They did, indeed, attempt something in that direction when, on October 3, 1935, they obtained the restraining order against the sheriff from executing the writ of assistance. Also when, on July 15, 1936 they petitioned for possession of the land and a restraining order from transfer of the property and for extension of the redemption period. In both these instances orders were made which showed that a sufficient showing for relief had not been made and, from the orders in both cases, no appeal was taken.

CONCLUSION

It may be true as Petitioner claims that a hardship has been imposed upon him. But whatever hardship he has suffered has been due to his own lack of diligence. Had he followed the procedure in the statute the result might have been different. Respondents have rights that are worthy of protection also. To upset such rights, diligently pursued, because this Petitioner has suffered, would be to make a mockery of diligent efforts to obtain recourse guaranteed by contract and statute. This the court will not do.

The foreclosures were completed during the time when the State court had exclusive jurisdiction.

Respectfully submitted,

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IN
THE SUPREME COURT
Of the United States

OCTOBER TERM, 1941

No. 2

MARTIN J. BERNARDS and LENA BERNARDS,
his wife,

Petitioners,

vs.

**M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), and JOSEPH M.
LOOMIS, Trustee,**

Respondents.

Upon Writ of Certiorari to the United States Circuit Court of
Appeals for the Ninth Circuit.

**ANSWER OF RESPONDENTS M. R. JOHNSON
AND CATHERINE COLLINS TO SUMMARY BRIEF
FOR PETITIONERS ON REARGUMENT**

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I N D E X

	<i>Page</i>
FACTS	1
FINDINGS OF FACT	4
THE AUTOMATIC STAY AND THE FORECLOSURE SALES .	5
OLD CASES UNDER THE ACT	12
THE PETITIONERS IN GENERAL BANKRUPTCY	15
THE AMENDED ACT AND THE RIGHT OF REDEMPTION .	8
RES JUDICATA	16
RECALL OF MANDATE	18
CONCLUSION	20

TABLE OF CASES

	<i>Page</i>
Buttars vs. Utah Mortgage Loan Corporation, 116 Fed. (2d) 622	7, 17
Chapman vs. Federal Land Bank, 117 Fed. (2d) 321	17
Cross vs. Furn. Co., 63 Fed. (2d) 421	4
Exchange Natl. Bank vs. Meikle, 61 Fed. (2d) 176, 179	4
Fairmont Creamery Co. vs. Minnesota, 275 U. S. 70, 72 L. Ed. 168	18
Layton vs. Thayne, 116 Fed. (2d) 796	7
Neece vs. Durst, 61 Fed. (2d) 591	4
Schell vs. Dodge, 107 U. S. 629, 27 L. Ed. 601	18
Union Joint Stock Land Bank vs. Byerly, 310 U. S. 1, 84 L. Ed. 1041	8, 18
Wharton vs. Farmers & Merchants Bank, 119 Fed. (2d) 487	18
Wright vs. Union Central Life Insurance Co., 304 U. S. 502, 82 L. Ed. 1490	8

IN
THE SUPREME COURT
Of the United States

OCTOBER TERM, 1941

No. 2

MARTIN J. BERNARDS and LENA BERNARDS,	}
his wife,	

Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), and JOSEPH M. LOOMIS, Trustee,	}

Respondents.

Upon Writ of Certiorari to the United States Circuit Court of
Appeals for the Ninth Circuit.

**ANSWER OF RESPONDENTS M. R. JOHNSON
AND CATHERINE COLLINS TO SUMMARY BRIEF
FOR PETITIONERS ON REARGUMENT**

FACTS

There are numerous statements in the various brief on behalf of petitioners which are not supported by the record. We believe these should be corrected even though some of them are not material to the legal issues here involved.

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At the bottom of page 4 of petitioners' original brief, there appears a statement, not in the record, with regard to the purported acts of the sheriff in seizing and selling household goods of the petitioners. This statement may be literally true for all we know, but the inference that respondents had something to do with it or to gain by it, which petitioners must have hoped the court would draw, is emphatically not true.

The statements beginning at the bottom of page 5 and running over through the third paragraph on page 7 of petitioners' principal brief are all unsupported by the record.

On page 2 of their reply brief, petitioners take issue with certain statements of fact made by respondents. Those statements were fully supported by the findings of the Conciliation Commissioner and the court and were in all things correct. So far as petitioners have cited the record at all to rebut them, they have cited the self-serving statements of petitioners themselves.

In petitioners' summary brief on rehearing on page 10, it is stated that no evidence was ever given before the Conciliation Commissioner other than in connection with the question whether or not the appellants were farmers. This is unsupported by the record and is not true. On the same page, near the bottom, the trial judge is alleged to have made certain remarks, and reference

is made, in support of this, to a paper filed by the petitioners in the Circuit Court of Appeals. No such remarks were ever made by the trial judge.

The findings of fact were filed May 10, 1938, the trial having been had April 13, 1938, on the petition of the bankrupts and the answers of the respondents herein, and the bankrupts' reply to said answers.

The petitioners' briefs state that no oral testimony was presented at the trial on which the findings of fact were based. The statement is true, but misleading. At the time of the trial, the petitioners presented no testimony in support of their petition, and to avoid presenting a large amount of documentary evidence, their attorney agreed to the allegations made in certain parts of the respondents' answers. (R. 64.)

All of the findings of fact were based either on the stipulation above mentioned, or on the record itself.

The numbers of the findings of fact with their sources appear in the following table:

I. R. 9, 13, 14	VIII. Stipulation
II. R. 17, 19, 135-138, 53	IX. Stipulation
III. R. 48	X. R. 20
IV. R. 54, 55, 24	XI. R. 50 Con. Commissioner's Findings XXIII, XXIV, XXV
V. R. 31, 32	
VI. R. 58 and stipulation	XII. R. 53, Con. Commissioner's Finding XXXV
VII. Stipulation	

XIII. Invalid under Bartels case	XVII. Stipulation
XIV. Invalid under Bartels case	XVIII. Stipulation
XV. Stipulation	XIX. Stipulation
XVI. Stipulation	XX. Stipulation
	XXI. Stipulation
	XXII. Stipulation

ARGUMENT

FINDINGS OF FACT

It will be seen that the findings of fact are completely justified by the transcript of record, were admitted in several essential parts by the petitioners, fully support the decree and if manifest error is not found will not be disturbed by this Court.

Neece v. Durst, 61 Fed. (2d) 591

Exchange Nat. Bank v. Meikle, 61 Fed. (2d) 176, 179

Cross v. Furn. Co., 63 Fed. (2d) 421

The findings do not speak directly of the bankruptcy proceedings in the period beginning with December 19, 1934, when the petitioners filed their amended petition and ending with August 28, 1935, when new (s) became effective. They show, however, that such proceedings and the lack of any proper proceedings by the petitioners

were in the minds of the conciliation commissioner and the court when the findings and orders of the commissioner and the orders of the court were made. See Findings II and III.

The findings also show the regularity of the election and actions of the trustee; Findings IV, V, VI, VII, VIII and IX. Also, non-compliance with conditions to obtain three years stay; and failure to submit a feasible plan for liquidation of secured claims in the composition-extension proceedings; Findings XI and XII.

THE AUTOMATIC STAY AND THE FORECLOSURE SALES

It will be recalled that petitioners were adjudicated bankrupts in December, 1934, and that the sheriff's sales took place after the Radford decision and before the amended section 75 (s) became law. Unquestionably these sales were valid unless the automatic stay provided for by section 75 (o) was still in effect, for as we have pointed out in our original briefs there was nothing else that could have prevented or invalidated the sales. The general bankruptcy act was no obstacle. The stay provisions in the former section 75 (s) had been invalidated by the Radford decision.

The Radford decision left section 75 (a) to (r) exactly as it was before the first section 75 (s) was passed. It provided solely a scheme for composition or extension of a farmer's debts, and subsection (o) (the stay provision) was intended to maintain the status quo until the farmer could propose a composition or extension and the proposal could be acted on by the creditors and the court. The stay was not intended to outlive the actual proceedings leading up to a composition or extension and this is made plain by its own words providing that proceedings against the debtor should not be maintained "prior to the confirmation or other disposition of the composition or extension proposal by the court." Furthermore, the proceedings were intended to be prosecuted with reasonable dispatch, and this Court, to assure that, had adopted General Order in Bankruptcy No. 50 providing that the court should dismiss proceedings not later than three months after the first meeting of creditors.

It is our position that the adjudication of bankruptcy was not only an abandonment of the composition or extension proceedings by the debtors but a *disposition* of them by the court. Petitioners have endeavored to meet this by arguing that the adjudication of bankruptcy was a nullity because old section 75 (s) was unconstitutional and have attempted to buttress this by saying that a farmer could not be adjudged an involuntary

bankrupt. But petitioners were not adjudged involuntary bankrupts. They were adjudged bankrupts on their own petition. Their adjudication was voluntary and there was a law authorizing them to become voluntary bankrupts. It is fallacious to say the adjudication was a nullity because they also asked for other relief under a void law.

Our position is supported by the recent cases of *Layton vs. Thayne*, 116 Fed. (2d) 796 and *Buttars vs. Utah Mortgage Loan Corporation*, 116 Fed. (2d) 622. There are other cases but we have chosen these because they were decided this year and in the light of all of the decisions handed down by this Court.

There being no stay in effect, the foreclosure sales were not prevented, and under the law of Oregon they transferred to the purchasers all rights in the land that the petitioners had, subject only to the statutory right of redemption, which, as explained in our original briefs, was nothing more than a right to repurchase. The purchasers were entitled to possession immediately upon sale.

We believe it was the late Mr. Justice Holmes who remarked that a title to property was a bundle of rights. The bundle that the foreclosure purchasers had after the sales included the right to the possession and enjoyment of the property, and the bundle that petitioners retain

contained only an option to reacquire that right by paying a sum of money.

As this Court has repeatedly held (*Wright vs. Union Central Life Insurance Co.*, 304 U. S. 502, 82 L. Ed. 1490 and *Union Joint Stock Land Bank vs. Byerly*, 310 U. S. 1, 84 L. Ed. 1041) the subsequent act of Congress, while it could affect the further remedial rights of the respondents, could not take from them the property rights that they already had and transfer them to petitioners.

THE AMENDED ACT AND THE RIGHT OF REDEMPTION

The new act, as this Court held in the Byerly case, was not automatic. It did nothing by its mere enactment. It was necessary, if petitioners were to secure any benefits by it, for them to take the statutory steps to set it in motion. Had they done so promptly, perhaps the running of the redemption period would have been interrupted for a three year stay period, although the right of possession and enjoyment could not have been restored to them. They would have been entitled to possession and control of *their property* but that right was no longer *their property*.

However, it is the position of these respondents that petitioners did not properly invoke the act. The act says

that they must be adjudicated bankrupts, that they must petition the court that their property be appraised and their exemptions set aside to them and that they be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of their property and that, *upon such a request being made*, the referee shall designate appraisers and that after the appraisal and the setting aside of exemptions a rental stay order shall be made.

Now all that petitioners actually did after the passage of this act and until after the right of redemption had expired was to petition the court that the reference of their case to a regular referee in bankruptcy be cancelled and that it be referred to a conciliation commissioner. They say in their summary brief that this was a *reinstatement* of their case.

As a matter of fact, their case did not call for reinstatement. It was already pending, and the new act provided for reinstating only cases that had been dismissed. The order on petitioners' request for rereference accomplished just what they asked for, namely a *rereference*, and nothing more. If they wanted such of the benefits of the new act as it may have been still possible for them to get after the foreclosure sales, it was necessary for them to comply with its provisions and make the request to the court that the act provided for. They

failed to do that until after the redemption period had expired.

If their own argument is to be accepted, they failed even to take the preliminary step of asking to be adjudicated bankrupts, because they say their adjudication in December, 1934 was void. Petitioners now argue, however, that the passage of the new act automatically breathed life into the bankruptcy adjudication that they say had been void, and they claim that their request for the benefits of the old act, filed in February, 1935, became, without any action on their part except their request for a rereference, a new application for the benefits of the new act.

The old act called for appraisal at "not necessarily the market value." The new act called for appraisal at the market value. The old act called for a five year stay under certain conditions. The new one called for a three year stay under different conditions. The new act says that the bankrupt, if he wants its benefits, *shall request* the appraisal, stay, etc. It does not say that a request made for something else, at a time when the new act was not even contemplated, may stand in place of what it says shall be done. Perhaps Congress could have provided that the taking of vain steps under the old act should excuse the necessity of taking more or less corresponding steps under the new one but certainly it

did not so provide, and if it had it would be hard to know where such a procedure began and left off. Suppose, for example, that an appraisal had actually been made under the old act. Could that take the place of an appraisal under the new one? Obviously not. Suppose a rental stay order had been made under the old act. Obviously it could not stand as a rental stay order under the new one and since, as this Court has held, the new act did not impose itself automatically on a farmer who had been under the old one, whether he wanted it or not, but only if he took steps to set it in motion, what steps would he have to take? The conclusion is irresistible that the steps he would have to take would be the ones set forth in the statute and that he would actually have to take them. It would not be enough that before the act was passed he had made a different request to the court.

Since petitioners did not set the new act in motion, we submit that the redemption period was not interrupted and that, at its close, no stay existed or was created to prevent the sheriff from issuing his deeds, and that the deeds were valid. Nothing that petitioners did or could do after the issuance of the deeds could affect the title of respondents to the land.

OLD CASES UNDER THE ACT

As to farmers' bankruptcy cases commenced before the Act of August 28, 1935, it is provided in (s) (5) of that act that there are three classes of cases in which the farmers could come under the act:

1. Cases then pending in any Federal Court.
2. Cases dismissed because of the Radford case.
3. Cases where any farmer debtor had filed under the General Bankruptcy Act provided he makes written request to the court to take advantage of the act.

Class 2 may be disregarded since this case was not dismissed because of the Radford case.

The petitioners claim this is a case then pending in the Federal Court under the provisions of (a) to (r) and deny that they have ever been under the General Bankruptcy Act.

Our position is that if petitioners either had a case pending or were general bankrupts, they never took the proceedings necessary to qualify them for the benefits of the act.

CASE PENDING

If the petitioners had not already forfeited their rights under (a) to (r) they were qualified on August 28, 1935, to begin proceedings under (s). But they had lost

their rights under (a) to (r) much earlier. Regardless of their duty to proceed with diligence, and after December 15, 1934, when the conciliation commissioner reported the failure of their second proposal to creditors and that his duties had been completed (R8), they did nothing, except for a vain attempt at a third proposal when on June 28, 1935, they asked the court for a reference to the conciliation commissioner. The order of the court on this reads in part (R. 145):

“And it further appearing that the secured creditor has already been delayed approximately one year by proceedings under these acts,

“It is Ordered that said petition be and the same is hereby denied.”

The above order in effect says that at some prior date the petitioners had exhausted their rights under (a) to (r) and this last application was for purposes of delay.

Taking December 15, 1934, when the second proposal to creditors failed, as a beginning date, a reasonable length of time within which the debtors must act was three months. An indication that this is a reasonable time under such circumstances is in Rule 50 (4) of the “General Orders in Bankruptcy,” which provides for a dismissal of proceedings:

“If the farmer has not applied for confirmation within such reasonable time as has been fixed therefor, which shall be not later than three months after the date of the first meeting * * *.”

The petitioners commenced their proceedings (a) to (r) on August 10, 1934, and were through with them in their own minds on December 15, 1934, as is shown by their amended petition of December 19, 1934. Meantime, the mortgagee-respondents were unable to move.

We claim, therefore, that the (a) to (r) proceedings were terminated by the laches of the petitioners three months after December 15, 1934.

The bearing of this on the renewal of the foreclosure is obvious.

On May 29, 1935, immediately after the Radford decision, respondents Johnson and the Bank renewed their foreclosure suit by issuance of execution, and on July 9, 1935, respondent Collins renewed her suit by entry of the foreclosure decree. (R. 72, 73.)

Showing the slow action of the petitioners, their willingness to delay proceedings and their consistent laches, see the outline of proceedings at the beginning of respondent Collins' first brief and notice how little was done by them properly and effectively between December 15, 1934, and September 10, 1936, by which latter date both foreclosure deeds had been executed.

Moreover, unless this became a general bankruptcy case, the petitioners had no way to obtain the benefits of sub-section (s) except to file a new amended petition.

THE PETITIONERS IN GENERAL BANKRUPTCY

In addition to the consideration of general bankruptcy in respondent Johnson's first brief, pages 31 to 33, we submit that if the amended petition, under the circumstances of this case, is held to be a petition in voluntary general bankruptcy, then the petition and adjudication and possibly the order of reference, etc., were parts of a general bankruptcy proceeding. As general bankrupts the petitioners could have taken advantage of the Frazier-Lemke Act by making a written request to the court (last sentence in Section 75 (s) (5).

The petitioners ask that their petitions of February 8, 1935 (R. 36) and September 30, 1935 (R. 16), be considered as the written request required by the statute.

The petition of February 8, 1935, was at a time when there was no statute providing for the appraisal request or for possession of the property which was specifically sought in the petition on the basis of sub-section (s).

The petition of September 30, 1935, and the order based thereon were for the special and limited purpose of obtaining a more conveniently located referee and contained no attempt to seek advantages under the new Frazier-Lemke Act. No written request appears until July 15, and August 8, 1936, when the petitioners petitioned the conciliation commissioner, who denied their

petition (R. 19, 22, 53) and no appeal was ever taken. It therefore never became a request to the court. Moreover, the deed on the Johnson foreclosure had been executed on July 1. While the redemption period under the Collins foreclosure did not expire until August 26, yet the Johnson sale had included the Collins property, on which the Johnson mortgage was a second lien, so it was Johnson, not Bernards, who was entitled to redeem the Collins tract from sale between July 1 and August 26. The next petitions which may be considered a request, were filed in January, 1937. (R. 25, 77.) This was months after the mortgagee-respondents had received their deeds on foreclosure.

RES JUDICATA

On this subject, we have little to add to what has been said in the previous brief of respondent Johnson. Suffice it to say that so far from the question of *res judicata* being raised for the first time in this court, it has been raised at every stage of the proceedings. For example, when petitioners filed with the Conciliation Commissioner their petition of January 4, 1937, respondent Loomis moved to dismiss it on the ground that all matters involved in it had already been adjudicated, and that motion was granted. It was raised before the District Judge and again raised before the Circuit Court of Appeals, even

though that court based its decision, at least in part, on other grounds.

It is of course true that bankruptcy courts have no terms and it has been held, as petitioners say, that they *may* rehear their previous decisions at any time before the case is closed *unless* rights have become vested in reliance upon them which will be disturbed by their vacation. But it is equally well settled that an order of a bankruptcy court cannot be collaterally attacked and stands unless appealed from, even as to some other application in the same cause, and it is just as clear that a party whose right of appeal from an order has expired cannot circumvent the statutory limitation of time for appeal by asking for a rehearing and then appealing from its denial. See the cases cited in the former brief of respondent Johnson and also *Chapman vs. Federal Land Bank*, 117 Fed. (2d) 321 (6th Cir.) and *Buttars vs. Utah Mortgage Loan Corporation*, 116 Fed. (2d) 622 (10th Cir.).

Moreover, rights had become vested in reliance on orders of the bankruptcy court. Not only was there never any attempt on petitioners' part to have the adjudication of bankruptcy set aside but later, after the Radford decision and before the sheriff's sales, the court made an order declining to re-refer the case to a conciliation commissioner so petitioners could make a third composition offer, and this refusal was based on the

express ground that petitioners were in bankruptcy (R. 145). (Incidentally this was the first adverse ruling with which petitioners met.) Later, after the sales, the court on a show-cause order permitted the sheriff to dispossess petitioners under a writ of assistance (R. 48). These rulings were made by a court having jurisdiction of the parties and the subject-matter, and respondents' rights became vested in reliance on them. If they, or any of the subsequent rulings of which petitioners later complained were erroneous, petitioners should have appealed from them instead of acquiescing and later seeking to attack them collaterally. *Union Joint Stock Land Bank vs. Byerly*, 310 U. S. 1, 84 L. Ed. 1041; *Wharton vs. Farmers & Merchants Bank*, 119 Fed. (2d) 487 (8th Cir.).

RECALL OF MANDATE

This subject was discussed fully in the previous brief of respondent Johnson, and the point was there made that no court of the United States has ever held that the jurisdiction of an appellate court over a case in which it has already rendered judgment extends beyond the term at which it was rendered and the issuance of the mandate, unless specifically retained by order. In that brief, two decisions of this Court, among others, were cited as authority, namely, *Schell vs. Dodge*, 107 U. S. 629, 27 L. Ed. 601 and *Fairmont Creamery Co. vs. Minne-*

sota, 275 U. S. 70, 72 L. Ed. 168. Petitioners, at page 5 of their reply brief, contended that in those cases the mandate was issued during the term when judgment was rendered. The date when mandate issued in these cases does not definitely appear in the reports but we have made a careful examination of the original records of this Court and it clearly appears therefrom that in both of them the mandate was not issued until after the term had closed, and in both of them this Court held that it could not recall the mandate because the term at which judgment was rendered had expired, even though the term in which the mandate issued had not expired. Incidentally, motion to recall the mandate was made and denied in all four of the cases tried together in *Schell vs. Dodge*—not in only one of them as stated by petitioners.

Petitioners say that *this Court* still had jurisdiction, because it had denied their first petition for certiorari on October 23, 1939, that being in the same term in which the application to the Circuit Court of Appeals now before the court was made and denied. Since the application was not made to this Court but to the Circuit Court of Appeals, the question would seem to be as to the jurisdiction of that court and not this Court. However, if petitioners' argument has anything to do with the case, then it would seem that, according to them, whenever this Court denies a petition for certiorari, the Cir-

cuit Court of Appeals should wait until the end of this Court's term before sending down its own mandate, because during the term this Court may reconsider. Then, when it does issue its mandate in the term following the term when certiorari was denied, the District Court should delay another term because, according to petitioners, the Circuit Court of Appeals may reconsider. In other words, if petitioners are right, the mere filing of a certiorari petition in the latter part of the term would prevent any decision of a Circuit Court of Appeals from becoming final for about two years' time. That has never been the law and certainly it never should be.

CONCLUSION

We submit that the decision of the Circuit Court of Appeals, and of the District Court, was right and should be affirmed because:

(1) The sheriff's sales, having taken place after the termination of the debtor proceedings under (a) to (r) and before the present sec. 75 (s) took effect, were valid and transferred to these respondents all interest in the land except a right of redemption amounting to a mere option to repurchase.

(2) Because of their laches and because they failed to take the steps required by the amended act petitioners

at no time prior to the issuance of the sheriff's deeds, or thereafter, became entitled to the benefits of the amended sec. 75 (s), and consequently the right of redemption was never extended and petitioners lost even that when the deeds were issued.

(3) The matters determined had been previously adjudicated by orders which were no longer appealable and based on which rights had vested.

(4) The judgment of the Circuit Court of Appeals, sought to be reopened, had become final.

Respectfully submitted,

WILLIAM L. BREWSTER,
Counsel for respondent
Catherine Collins.

H. G. PLATT,
A. D. PLATT,
Counsel for respondent
M. R. Johnson.

Office - Supreme Court, U. S.

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SUPREME COURT OF THE UNITED

STATES

OCTOBER TERM, 1940

No. 54 2 4

MARTIN J. BERNARDS AND LENA BERNARDS,
Petitioners,
vs.

M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF PORT-
LAND AND JOSEPH H. LOOMIS, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR REHEARING.

WILLIAM LEMKE,
Counsel for Petitioners.

INDEX.

SUBJECT INDEX.

	Page
Petition for rehearing	1
Question involved	3
Summary of material facts	4
Argument	6

TABLE OF CASES CITED.

<i>Borchard v. Bank of California</i> , 60 Sup. Ct. 957	9
<i>Bradford v. Fahey</i> , 76 F. (2d) 628	9
<i>John Hancock Mutual Life Ins. Co. v. Bartels</i> , 308 U. S. 180	4
<i>Kalb v. Feuerstein</i> , 308 U. S. 180	9

OTHER AUTHORITY CITED.

Senate Report No. 1045, 76th Congress, 1st Session	3
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 54

MARTIN J. BERNARDS AND LENA BERNARDS,
Petitioners,
vs.

M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF PORT-
LAND AND JOSEPH H. LOOMIS, TRUSTEE.

PETITION FOR REHEARING.

To the Honorable, the Supreme Court of the United States:

The petitioners in the above entitled cause present their petition for a rehearing, and that consideration thereof be deferred pending the appointment of another justice and in support thereof respectfully show:

1.

In this case the judgment was confirmed by an equally divided court. We presume four judges voting for confirmation, and four for reversal. The decision of this Court really decides nothing. It is a tie. It is only by the law

of chance that the respondents win. The fact of having obtained as we feel an erroneous decision in the lower court, gives the petitioners', mortgagors, property to the respondents, mortgagees.

2.

The confirming of the judgment by an equally divided court does not decide or settle any question of law or fact raised on the appeal to this Court. If allowed to stand it takes property worth more than the mortgage indebtedness from the petitioners, and gives it to the respondents.

3.

The decision of this court is *Per curiam*. The court wrote neither a confirming nor a dissenting opinion. Counsel, therefore, does not know the grounds upon which four judges voted to confirm the judgment, or the reason why four judges voted to reverse the court below. While the printed record before this Court is poorly arranged and somewhat confusing, yet counsel feels that upon reargument many of the difficulties can be ironed out. Counsel feels that the questions of law and fact involved in this case should be disposed of by a majority of the court. We feel confident that a rehearing will bring about that result.

4.

It was the intention of Congress, when it passed section 75 of the bankruptcy act as amended, that the act should be liberally construed in favor of the mortgagor. If there is any doubt in the mind of the court, the balance of the doubt should be given to the mortgagor, and not to the mortgagee. A court of bankruptcy is a court of equity. It has a continuing jurisdiction from the time the petition is filed until the discharge of the bankrupt. If the court below failed to do equity, if its decision was unduly influenced by the credi-

tors, its decision should be reversed (R. 148). Senate Report No. 1045, 76th Congress, 1st Session.

5.

Under these circumstances counsel feels that this Court ought to reconsider this case and grant a rehearing. This so that the court may have the benefit of the more fully considered arguments of counsel for both appellants and respondents on the questions of law and facts involved in this case. Counsel feels that this case ought to be considered and disposed of by a full court. Otherwise the appeal in this case has been a waste of time, the court having decided no issues involved.

Therefore, petitioners move this Honorable Court to grant a rehearing, and that consideration thereof be deferred pending the appointment of another Justice.

Respectfully submitted,

WILLIAM LEMKE,
Counsel for Petitioners.

Certificate of Counsel.

I, counsel for the above named petitioners, do hereby certify that the foregoing petition and motion for rehearing in this cause is presented in good faith, and not for delay.

WILLIAM LEMKE,
Counsel for Petitioners.

Question Involved.

The ultimate question involved in this case is whether all the provisions of section 75 of the bankruptcy act, and especially subsection (s), are mandatory upon the court of bankruptcy. We submit they are. Congress did not intend that the courts of bankruptcy should annul any of the provisions of this act by judicial legislation.

The secondary question involved is whether the motion and petition asking the Circuit Court of Appeals to recall its mandate and correct its erroneous decision so as to conform to the decision of the Supreme Court of the United States in the case of *John Hancock Mutual Life Insurance Company v. Benno Bartels* case, 208 U. S. 180, was made in time. We submit it was. It was made during the same term of court that the mandate was issued.

Summary of Material Facts.

On August 10, 1934, petitioners, mortgagors, filed their petition under section 75 of the Bankruptcy Act (R. 1, 2). On December 4, 1934, the respondents, mortgagees, rejected the petitioners' proposal for composition and extension of time made pursuant to section 75 (R. 8, 9). Thereupon, on December 19, 1934, petitioners amended their petition and proceeded under old subsection (s) of section 75 (R. 9-11).

On May 27, 1935, this Court held old subsection (s) of section 75 unconstitutional. 295 U. S. 555. On August 28, 1935, Congress amended several subsections of section 75, and added the present subsection (s). Thereafter, on September 30, 1935, petitioners filed a petition in the District Court asking that all of the records, documents and proceedings theretofore had under old subsection (s), be recalled from the referee, and transferred to the Conciliation Commissioner, under the provisions of the new subsection (s) (R. 16, 17).

The District Court granted the petition and ordered all the records, documents and proceedings transferred to the Conciliation Commissioner (R. 17, 18, 19). *Among these documents was the petition filed February 8, 1935, in which the petitioners asked for the benefits of subsection (s) (R. 36, 37). This petition is one of the records that was*

transferred to the Conciliation Commissioner. This was a reinstatement of petitioners' case under the new subsection (s).

On January 4, 1937, petitioners again petitioned the Conciliation Commissioner demanding the benefits of subsection (s). They asked for an appraisal of their property, and for the removal of the trustee, who was appointed in violation of section 75. They asked for the possession of their property (R. 25, 26, 27). This motion was denied January 11, 1937 (R. 30, 31).

On January 15, 1937, petitioners petitioned the District Court to review all of the proceedings had under the Conciliation Commissioner on the grounds that each and all of them were contrary to law and void. They asked the court that they be given possession of their property as provided for in plain language in Section 75 (s) (R. 77-86). On April 13, 1938, petitioners filed a motion to the same effect (R. 34, 35).

On May 10, 1938, the District Court, decided the petition and motion upon their merits, making a lengthy Finding of Fact (R. 64-74). On the same day the District Court entered an order and a decree dismissing the petitioners' petition filed on January 15, 1937, and dismissed their motion filed April 13, 1938, to vacate and to set aside all orders of the court, etc. (R. 37, 38). On the same day, May 10, 1938, the court also entered an order confirming the Conciliation Commissioner in dismissing petitioners' petition filed January 4, 1937 (R. 39).

From these two final orders of the District Court petitioners appealed to the United States Circuit Court of Appeals for the Ninth Circuit. That court holding that the stay under Subsection 75 (o) did not apply to Subsection (s). And that the stay under Subsection (s) was not an automatic stay, but a judicial stay. We submit that that is

error number one. The court is wrong in both of its conclusions.

The Circuit Court further sustains the District Court in finding that petitioners made no attempt to comply with the conditions required of them by the Frazier-Lemke Act, in order to obtain the privilege of a three year's stay. Both courts failed to tell us just what those requirements were. If they had read the statute more carefully they would not have had any trouble in discovering that the petitioners were never given an opportunity, because of their erroneous decisions. And finally the court says that petitioners at the time of filing their petitions on December 19, 1934, and at all times thereafter, have been in truth and in fact beyond all hope of financial rehabilitation. We submit that that position was squarely overruled by this Court, in the *Bartels* case, and in the *Borchard* case.

ARGUMENT.

Respondents in this case attempt to take advantage of their own wrong. In reading the record one comes to the conclusion that at every turn of the road respondents, and a prejudiced Conciliation Commissioner, did all in their power to prevent the petitioners from enjoying the benefits of Section 75 of the Bankruptcy Act. On August 8, 1936, they had a trustee appointed, and ousted the petitioners from their lawful possession. While the act provides: "If at the time that the farmer debtor amends his petition, or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this act."

Even the District Judge finally got tired of the juggling of the respondents, and talked to them in pretty plain language. He stated that "*the proper thing in this case is*

an order putting the mortgage holder out of there, but I haven't jurisdiction; jurisdiction in the first instance rests with the Conciliation Commissioner, but if he does not act, or if he refuses to act, then I will act." We regret that the Judge did not act. It would have saved a great deal of unnecessary litigation. Then petitioners would not have been ousted from their home in violation of an act of Congress (R. 148).

When petitioners' petition was reinstated under the provisions of new Subsection 75 S-5, all the records and documents filed under that petition were also reinstated, including petitioners' request for the possession of all of their property, and the appointment of appraisers, as provided by the act. This request was filed on February 8, 1935. A similar request was again made on October 1, 1936, and again on January 4, 1937, but all of these requests were denied by the Conciliation Commissioner.

Provisions Mandatory.

The provisions of Section 75 (s) are mandatory, and while the stay of three years is not absolute, the statute itself provides the exception. No court has authority to sell the debtor's property because his liabilities exceed his assets, or because, if the court concludes that the debtor cannot be rehabilitated. To do so is reading something into the statute that is not there. It is judicial legislation.

"Section 75 (s) (2). When the conditions set forth in this section have been complied with, the court *shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays*

a reasonable rental semi-annually for that part of the property of which he retains possession."

Bartels Case.

In the *Bartels* case Justice Hughes says: "*The subsections of Section 75 which regulate the procedure in relation to the effort of a farmer-debtor to obtain a composition or extension contain no provision for a dismissal because of the absence of a reasonable probability of the financial rehabilitation of the debtor—nor is there anything in these subsections which warrants the imputation of lack of good faith to a farmer-debtor because of that plight. The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to seek an agreement with their creditors (subsections (a) to (r)) and, failing this, to ask for the other relief afforded by subsection (s). The farmer-debtor may offer to pay what he can, as Bartels did, and he is not to be charged with bad faith in taking the course for which the statute expressly provides.*" 308 U. S. 180. See also K.

Cannot Surrender Jurisdiction.

Under section 75, a court of bankruptcy cannot surrender jurisdiction of any part of the farmer-debtor's estate to a State court. The Congress put the complete and absolute jurisdiction in the Federal Court. When a farmer-debtor comes into a court of bankruptcy, he comes into a court of equity. We come into a court of conscience.

It seems to us absurd for a court to say that subsections (n) and (o) do not apply to subsection (s). That is not an unbiased conclusion. Every part of section 75 applies to every other part. The act is but one act. The farmer-debtor has a legal right to ask for a three year period in which to refinance himself upon paying a reasonable rental,

and complying with the lawful orders of the court. This right the District court may not deny him, but unfortunately it did. *Kalb v. Feuerstein*, 308 U. S. 180. *Borchard, et al. v. Bank of California, et al.*, 60 Sup. Ct. 957.

“For the court to afford the relief which the section as amended contemplates, it is necessary that the exclusive and paramount jurisdiction of the court over the property of the bankrupt be maintained; and there can be *no question but that the provisions of subsections (u) and (v) apply as well to proceedings continued under subsection (s) as to proceedings under the other provisions of Section 75*”. *Bradford v. Fahey*, 76 F. (2d) 628 (C. C. A. 4th.)

Recall of Mandate.

We submit that the motion to recall the mandate was made in time. It was made at the same term in which it was issued. *There is no hard and fast rule on this subject. Courts have a right to correct their mandates—their erroneous decisions—even if the motion is not made in the same term.* In this case the court still had jurisdiction. The petition and motion to recall the mandate and to correct its erroneous decisions so as to comply with the decisions of the Supreme Court of the United States, was made during the term in which the mandate was issued.

Conclusion.

In conclusion we submit that the Supreme Court of the United States, in the cases we have cited above, has reversed every position taken by the District and Circuit courts below. The District court finds that petitioners did not comply with the act. *The record shows that the court did not let them. It gave them no opportunity. It erroneously deprived them of possession. They couldn't pay rental when the respondents were in possession and oper-*

ating the property. Under these circumstances we are confident the court will grant a rehearing, and that the decision will be deferred until there is a full court.

Respectfully submitted,

WILLIAM LEMKE,
Counsel for Petitioners.

(4051)

SUPREME COURT OF THE UNITED STATES.

No. 2.—OCTOBER TERM, 1941.

Martin J. Bernards and Lena Bernards,	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
Petitioners,		
vs.		
M. R. Johnson, et als.		

[November 10, 1941.]

Mr. Justice ROBERTS delivered the opinion of the Court.

We took this case because it presents important questions of appellate practice under § 75¹ of the Bankruptcy Act.

The petitioners, who are adjudicated bankrupts, attack an order and a decree of the District Court, which were affirmed by the Circuit Court of Appeals.² The respondents are mortgagees who purchased property of the bankrupts at foreclosure sales, and the trustee in bankruptcy.

The petitioners were owners of land in Oregon. April 12, 1933, the respondent, Collins, brought foreclosure proceedings on a mortgage which was a first lien on a portion of the land. April 6, 1934, two of the respondents, Johnson and United States National Bank (herein, for the sake of brevity, referred to as Johnson) instituted a foreclosure suit under a mortgage which was secured by a pledge of personalty and was also a first lien on all the land not covered by the Collins mortgage, and a second lien on the tract mortgaged to Collins. July 11, 1934, a state court entered a decree of foreclosure in the latter suit.

August 10, 1934, the petitioners jointly applied to the District Court, as farmers, for composition or extension of their indebtedness. On the same day the court restrained, until further order, any sale under the Johnson mortgage, and referred the cause to a conciliation commissioner. That officer having reported, on the reference and on a re-reference, failure to agree on a composition or extension, the petitioners, December 19, 1934, reciting the failure and their desire to have the benefits of the bankruptcy act, and particularly of sub-

¹ 11 U. S. C. § 203.

² 103 F. (2d) 567.

section (s) of § 75 as it then stood,³ prayed that "they and each of them be adjudged by this court to be bankrupts, within the purview of said Acts of Congress." An adjudication as to each petitioner was entered, and, December 20, 1934, the case was referred to a referee.

February 8, 1935, the bankrupts petitioned for the appointment of appraisers and to be allowed to retain possession of their property, as provided in sub-section (s).

February 18, 1935, the restraining order of August 10, 1934, was vacated as superfluous, inasmuch as sub-divisions (a) to (r) of § 75 are self-executing.⁴ May 21, 1935, appraisers were appointed. May 27, 1935, this court held sub-section (s) unconstitutional.⁵

June 28, 1935, the petitioners applied for a re-reference of their original petition for composition or extension to a conciliation commissioner. The application was denied by the court on the ground that they had been adjudged bankrupts and that their bankruptcy proceeding was then pending before a referee. No appeal was taken.

June 29, 1935, Johnson purchased the mortgaged realty and the pledged personalty at a sale in the Johnson foreclosure suit, held pursuant to order of the state court, and the sale was confirmed July 20, 1935. The petitioners appeared and opposed confirmation, but did not appeal from the decree.

August 26, 1935, a sale was made to Collins pursuant to a foreclosure decree entered by the state court, July 9, 1935, under the Collins mortgage, and the sale was confirmed September 16, 1935.

A new sub-section (s), to replace that held unconstitutional, having been adopted August 28, 1935,⁶ the petitioners, September 30, 1935, reciting their adjudication as bankrupts and the reference of the case to a referee, and, relying on the newly adopted sub-section (s), which authorizes conciliation commissioners to act as referees in § 75 cases subsequent to adjudication, moved the court to recall the proceedings from the referee. By order of even date the prior reference was recalled, and the referee was directed to remit the record to the court.

³ The sub-section was added to § 75 by the Act of June 28, 1934, 48 Stat. 1289.

⁴ It appears from the record that this order was entered *nunc pro tunc* on August 24, 1938, the court reciting that, through inadvertence, the order was not entered when made, although shown on the clerk's notes, and within the recollection of the judge. The petitioners do not challenge the verity of the recital.

⁵ Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555.

⁶ Act of August 28, 1935, 49 Stat. 942, 943.

from the day

Although under the Oregon law a purchaser at foreclosure sale is entitled to ~~immediate~~ possession of the land, ~~upon confirmation~~ of sale,⁷ the debtors remained in possession. To oust them Johnson applied to the state court for a writ of assistance. October 3, 1935, the bankruptcy court, at petitioners' instance, temporarily restrained the sheriff from executing any such writ.

By order of October 15, 1935, the court, reciting the adjudication of December 19, 1934, referred the bankruptcy case to a conciliation commissioner.

December 18, 1935, the court dissolved the temporary restraining order against the sheriff, for the reasons that the property had been sold pursuant to an execution in the Johnson foreclosure and the sale duly confirmed; that, when these steps were taken, the state court had jurisdiction acquired prior to the commencement of the proceedings under § 75; and that the execution of the writ of assistance would not, therefore, interfere with any property of the bankrupt. No appeal was taken from the order, the writ of assistance issued, and the petitioners were dispossessed January 25, 1936.

The period of redemption from the sale in the Johnson foreclosure expired June 29, 1936, and, on July 1, a sheriff's deed was delivered.

July 15, 1936, the bankrupts filed with the conciliation commissioner a petition reciting the institution of the extension proceeding, its futility, the consequent adjudication of bankruptcy, the sheriff's sale under the Johnson mortgage, and its confirmation. They alleged that they were farmers within § 75 as amended August 28, 1935, and were, under the terms of the statute, entitled to the possession of the mortgaged property and its proceeds; that Johnson was endeavoring to exercise control of and exclude them from the property. They prayed an order granting them immediate possession, control, and management of the real estate, and restraining the sheriff, Johnson, and Collins "from transferring without purchase of said property in accordance with the Frazer-Leinke Act as amended" [sic]; and for a further order "specifically extending the period of redemption as provided" in the Act.

Johnson filed an answer and cross-petition which is not included in the transcript of record certified to this court. The debtors replied asking that the answer be dismissed; that they be accorded

⁷ Oregon Code, 1930, § 3-510. Sales of personal property are without redemption; Dixie Meadows Co. v. Knight, 150 Ore. 395, 405.

the full benefits of the Act, that the sheriff's deed be cancelled, and that Johnson be required to account for all crops harvested and property removed from the land.

August 8, 1936, the commissioner found that the bankrupts had never petitioned under the new sub-section (s) for appraisal, the setting aside of their exempt property, and for possession of their property under the control of the court; that appraisers had never been appointed or the property appraised; that no order in respect of exemptions or for possession by the bankrupts had ever been made; that no stay order had been entered; that no rental had ever been fixed; that no order of any sort had been made under the amended sub-section except the orders recalling the proceedings from the referee and referring them to the commissioner; that the bankrupts are not farmers within the definition of the Act; that on August 28, 1935, when the new sub-section (s) took effect, they had only an equity of redemption in the lands, except for the tract covered by the Collins mortgage; and that the new sub-section (s) was unconstitutional. He entered a decree to the effect that since June 29, 1935, the date of the foreclosure sale, the bankruptcy court had had no jurisdiction of the land then sold; that the new sub-section (s) had no application to any of the land sold in foreclosure; that the bankrupts were not farmers within the meaning of the Act, and were not entitled to the benefits of the Act; that their petition should be denied; and that a trustee should be appointed to liquidate the estate.

The time fixed by standing rule of the District Court for petitioning for a review of a referee's order in bankruptcy is twenty days. No application was made within that time to have the order reviewed.

August 29, 1936, the creditors elected, and the commissioner thereupon appointed, the respondent, Loomis, trustee and, September 3, the commissioner entered an order approving his bond.

September 10, 1936, the year for redemption from the sale in the Collins foreclosure having expired, the sheriff delivered his deed to Collins as purchaser.

September 19, 1936, the bankrupts filed with the commissioner a "notice of appeal" from the orders of August 29 and September 3. Treating the notice as a petition for review, the commissioner filed his certificate with the District Court.

Meantime administration of the estate proceeded as in ordinary bankruptcy and appraisers were appointed September 25, 1936. October 23 they filed an appraisal of the property of the bankrupts, not including that which had been sold in foreclosure.

December 15, 1936, the District Court entered a decree confirming the commissioner's orders of August 29 and September 3. No appeal was taken.

January 4, 1937, the bankrupts filed with the commissioner a petition reciting their adjudication as bankrupts, and praying that the commissioner proceed with the appraisal of their property; that he rescind the order of August 8, 1936; that he remove the trustee because the latter was not elected by the requisite majority in amount of unsecured creditors, and was an improper person; that the trustee be ordered to account for all property coming into his possession; and that the bankrupt's exemptions be set aside to them. They asked for other specific relief not necessary to detail, and for general relief. January 11, 1937, the commissioner ordered the petition dismissed, "for the reason that all matters and things in said petition alleged have heretofore been considered upon petition filed by said bankrupts and decided adversely to said bankrupts, and said orders have all become final and conclusive."

January 13, 1937, the bankrupts filed in the District Court a petition for an order restraining the trustee from selling the personal property of the estate. The petition was denied two days later. No appeal was taken.

January 15, 1937, they filed in the District Court a petition wherein, after praying that all the files in the case be incorporated by reference, they set out in summary a history of the proceeding from the filing of the original petition for extension or composition, attacked many of the orders theretofore made, prayed that their failure to seek a review of the order of the commissioner of August 8, 1936, within the time limited for that purpose be excused; that the court review the entire proceeding, reverse all previous orders of the commissioner, and hold the petitioners farmers entitled to the benefits of the Act; that the court treat the petition "as exceptions to said decisions of the commissioner", and grant the petitioners appropriate relief, and, meantime, restrain the trustee from selling any personal property of the estate.

January 29, 1937, they filed with the court a petition for review of the commissioner's order of January 11, 1937, dismissing their petition of January 4, 1937.

To the petition of January 15, 1937, Johnson and Collins filed answers reciting the various steps in the proceeding and the orders made by the commissioner and the court as to which there had been no review or appeal, and alleging that all the issues raised in the petition had consequently been finally adjudicated against the petitioners.

In addition each answer recited the proceedings in the state court as they are above outlined, and asserted that as a result of those proceedings each respondent had acquired title and possession, and that the bankrupt, Bernards, was interfering with that possession, and prayed that their title might be quieted. The trustee in bankruptcy also filed an answer setting up the finality of the unappealed and unreviewed orders in the cause and praying certain relief.

April 13, 1938, the bankrupts filed in the court a motion to vacate and set aside "all orders of this Court, and of all the Referees and Conciliation Commissioners where it was sought to set aside or delay the carrying out of any of the provisions of the Bankrupt Act" and to reinstate the cause. The grounds assigned were to the effect that the court, the referee and conciliation commissioner had failed to comply with the Act.

The District Court held a single hearing upon the petition of January 15, 1937, the petition for review of January 29, 1937, and the motion of April 13, 1938. The bankrupts admitted the truth of the facts set up by the respondents in their cross-petitions, but not their legal effect. As all the facts were of record or admitted no testimony was taken.

May 10, 1938, the court affirmed the commissioner's order of January 11, 1937. Upon the petition of January 15, 1937, and the motion of April 13, 1938, the court made findings of fact and stated conclusions of law which were embodied in the order and decree entered. This dismissed the petition and denied the motion, quieted the title of the mortgage-creditor respondents as against the bankrupts to the lands purchased by them at foreclosure sale, ratified and approved the orders of the commissioner, and in effect directed that the cause proceed as an ordinary bankruptcy and not under § 75(s).

In its findings the court details the history of the proceeding and recites the order of the court of December 18, 1935, the order of the

commissioner of August 8, 1936, the order of the court of December 15, 1936, affirming the commissioner's orders of August 29 and September 3, 1936, and finds with respect to each that no review was prayed or appeal taken within the time limited by rule or by law and that each of them had become final.

The bankrupts took one appeal from the order affirming on review the commissioner's order of January 11, 1937, and the order and decree dismissing their petition of January 13, 1937, and their motion of April 13, 1938, and granting the relief asked by the respondents.

May 2, 1939, the Circuit Court of Appeals affirmed both orders. May 25, 1939, that court stayed its mandate until July 15, and, directed that if a petition to this court for certiorari should be docketed by that date, the mandate should be stayed until after we had passed upon the petition.

A petition for certiorari was docketed July 10, 1939, and was denied October 23. The mandate of the Circuit Court of Appeals issued October 28. A motion made November 4, to recall the mandate and hold it pending our decision in *John Hancock Mutual Life Insurance Co. v. Bartels*, 308 U. S. 180, was denied November 6. The *Bartels* case was decided December 4, 1939. January 2, 1940, the petitioners presented to the Circuit Court of Appeals a motion "for recall and correction, amendment, revision or opening and vacating mandate and judgment entered thereon", upon the ground that the court's decision was contrary to ours in the *Bartels* case.

January 2, 1940, this court decided *Kalb v. Feuerstein*, 308 U. S. 433, and, January 18, the bankrupts supplemented their pending motion, alleging that our decision was in conflict with that of the Circuit Court of Appeals in the instant case.

March 22, 1940, the Circuit Court of Appeals denied the motion and, April 12, the bankrupts again petitioned for certiorari asserting that the court had disregarded our two decisions in holding that the bankrupts' inability to rehabilitate themselves was a relevant factor in appraising their right to resort to § 75 (s) and in holding further that the automatic stay created by sub-section (c) did not survive adjudication under sub-section (s), and had refused, although it had the power, to recall its mandate so as to correct its erroneous construction of the Act. We granted certiorari April 26, 1940.

Three questions emerge from this long and complicated record. They are:

1. Assuming the decision of the Circuit Court of Appeals was erroneous, had it power to recall its mandate and reconsider the appeal? We hold that it had.

2. Assuming the challenged orders of the commissioner and the court were erroneous, were they final, binding, and impregnable to subsequent attack, since review or appeal was not sought or taken within the time limited by court rule or by law? We hold that they were.

3. Had the state court jurisdiction to proceed with foreclosure and to invest the mortgage creditors, as purchasers at the execution sales, with valid title to the mortgaged lands? We hold that it had.

First. The judgment of the Circuit Court of Appeals was rendered in its October 1938 Term. The stay of the mandate did not end, and the mandate was not issued, until that term had expired. The application for recall of the mandate was presented within the following term, during which the mandate had gone down. The respondents assert that the court lacked authority, after the term in which its judgment was rendered, to recall its mandate and to amend its judgment in matter of substance.

In granting the stay the Circuit Court of Appeals might have extended the term so that it could further consider the case after this court had acted on the petition for certiorari. We think that, by staying the issue of the mandate and retaining the cause until after the subsequent term had opened, the court, in effect, did extend the term as respects the instant case and that, upon disposition of the petition for certiorari, it had power to take further steps in the cause during the term in which the stay expired and the mandate issued.

Second. The District Court disposed of three distinct matters in the orders under review: The petition for review of the commissioner's orders of January 11, 1937, the petition of January 15, 1937, and the motion of April 13, 1938.

The court dismissed the petition for review. The commissioner had denied the petition of January 4, 1937, on the sole ground "that all the matters and things set out in said petition have been previously adjudicated and no review thereof has been had, or if review was taken, such actions of the Referee have been approved on review", and that "all matters and things in said petition alleged

have heretofore been considered upon petition filed by said bankrupts and decided adversely to said bankrupts, and said orders have all become final and conclusive." The order affirming the action of the commissioner did not deal with the merits. The court clearly affirmed the commissioner's refusal to consider the petition for the reason stated by him.

In dismissing the petition of January 15, 1937, and the motion of April 13, 1938, the court made findings of fact and stated conclusions of law covering both. It entered what it denominated an "order and decree" with respect to both, and, as above noted, dismissed both the petition and the motion, on the stated ground that all issues therein raised had been finally adjudicated and no review or appeal had been timely sought or taken.

If the respondents had not cross-petitioned for affirmative relief, the District Court need have taken no further action than it did in dismissing the bankrupts' petition and motion. An order denying a petition for rehearing or review which is dismissed because the petition was filed out of time, without reconsideration of the merits, does not extend the time for appeal from the original order.* But there remained for disposition the prayers of the respondents for affirmative relief. The additional provisions of the decree were in answer to these prayers. As those provisions were assigned as error, the Circuit Court of Appeals had jurisdiction to review them.

Upon the admission of counsel for the bankrupts, the District Court found the facts as to the foreclosure proceedings and found that they were before a court having jurisdiction; that the titles acquired through the execution sales were good as against the bankrupts, and quieted the titles of the mortgagees as purchasers. With respect to the relief and the instructions prayed by the trustee, the court made certain findings as to what had been done in the administration of the estate, confirmed that action, and instructed the trustee as to his further proceedings. These findings and these provisions of the decree obviously were made in response to the cross-petitions of the respondents. They cannot be considered as a review of the merits requested by the petitioners.

The court also found that the bankrupts had made no attempt to comply with the new sub-section (s) of § 75; that they had, ever since the filing of their petition for adjudication on December 19,

* *Bowman v. Loperena*, 311 U. S. 262, 266.

1934, been beyond all hope of financial rehabilitation; that there was no possibility of such rehabilitation. Such findings constitute no basis either for a refusal to adjudicate the farmer-petitioner a bankrupt under § 75(s) or for dismissing the cause instead of following the procedure outlined in the sub-section.⁹ In the instant case, however, these findings, though evidently directed to the relief prayed by the respondents, were not necessary to the decision of any of the questions they submitted to the court and do not render erroneous the proper disposition of the issues submitted.

Third. The petitioners urge that the automatic stay imposed by sub-section (o), and the extension of the period of redemption created by sub-section (n), continued throughout the case and that all action taken in the state court was, therefore, void under the doctrine announced in *Kalb v. Feuerstein*, *supra*. The respondents insist that, in order to continue the extension and have the benefit of the stay after the conclusion of the conciliation proceedings and the adjudication in bankruptcy, timely application to the bankruptcy court to that end had to be made by the petitioners. We find it unnecessary to discuss or decide the important question thus mooted, for the reason that the orders and decrees entered by the bankruptcy court, if valid, relieved the respondents, as mortgagees, of any disability to pursue their foreclosure suits arising out of the pendency of the bankruptcy proceeding and left them free to prosecute the foreclosures in the state courts. However erroneous the challenged orders, the remedy for their correction was by timely application for review or timely appeal.¹⁰ Since the District Court refused to review these orders and decrees out of time, the petitioners could not attack them in the Circuit Court of Appeals.

The judgment is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

⁹ *John Hancock Mut. L. I. Co. v. Bartels*, 308 U. S. 180, 184-185.

¹⁰ *Union Joint Stock Land Bank v. Byerly*, 310 U. S. 1, 10.

